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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 609.

THE DAYTON POWER AND LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

BRIEF ON BEHALF OF APPELLEE.

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Columbus, Ohio, March 7, 1934.

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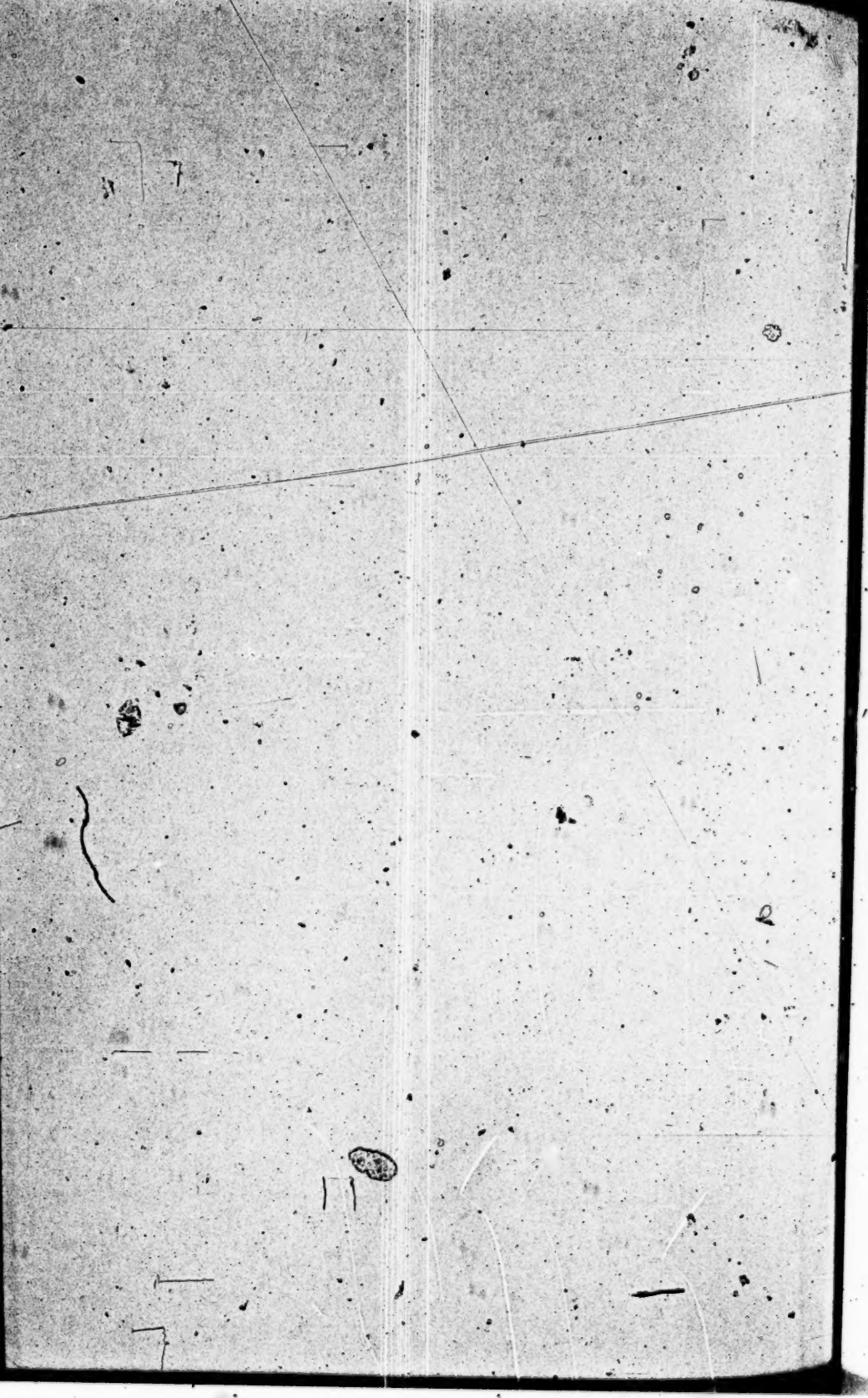

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IN THE

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OCTOBER TERM, 1933.

No. 609.

THE DAYTON POWER AND LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

The "statement of the case" in appellant's brief, (pp. 2-6) contains certain allegations with which appellee cannot agree. It is necessary therefore, that appellee restate the case which it will attempt to do as briefly as possible.

The case is in this court on appeal from a judgment

of the Supreme Court of Ohio affirming an order made by appellee, the Public Utilities Commission of Ohio, denying the appellant the right to increase its rates for natural gas service to some fourteen thousand (14,000) consumers in the communities of North Hampton, Piqua, Sidney, South Charleston, Tippecanoe City, Troy, territory adjacent to Troy, Washington C. H., and Wilberforce, Ohio. The rates sought to be increased had been in effect in these communities for many years prior to the application for the increase here involved. (R., 129.) This application for an increase in rates was filed on June 17, 1929, under the provisions of Section 614-20 of the General Code of Ohio, as it then existed. (110 Ohio Laws, 366—Appendix.) On March 12, 1929, there had been passed by the Ohio Legislature, an act (also Sec. 614-20) which was approved and filed with the secretary of state on March 20, known as the Carpenter Act, (113 Ohio Laws, 17, Appendix), which act repealed the provisions of the former Section 614-20, then known as the Pence Law, the act under which this increase in rates was filed, and substituted therefor a new procedure for such a case as this, by virtue of which an increase in utility rates could not be put into effect until after the appellee had determined that such increased rates were just and reasonable. The effective date of this new act was June 18, 1929, just one day after the filing of appellant's application in this case.

However, appellant, proceeding under the Pence Law, (Section 614-20 prior to July 18, 1929), elected to put into effect its proposed increase in rates after the ex-

piration of one hundred twenty (120) days as provided in said Pence Law, posting a bond guaranteeing the repayment of the increase in rates collected thereunder if they subsequently should be found to be unreasonable. Appellant has been collecting these increased rates down to the present time. The appellant undoubtedly instituted this proceeding at the time it did, in order that it might have the benefit of the collection under bond provisions of the old Pence Law, for had it waited twenty-four hours, the new law (Carpenter Act, present Section 614-20) would have been effective.

Appellant is a distributing company. That is, it owns the gas distribution plants in the communities it supplies with gas, but does not own any gas producing lands or transmission pipelines. It buys its gas supply from The Ohio Fuel Gas Company under wholesale contracts, which call for the payment of forty-five cents (45¢) per M c. f. delivered at the several town borders or city gates.

The Dayton Power and Light Company is affiliated with The Ohio Fuel Gas Company and both companies are under the management of the parent company, The Columbia Gas and Electric Company. (R., 222.)

Several hearings were held by appellee and testimony was presented by witnesses for this appellant as to the valuation of that portion of the distribution system of the appellant allegedly used in serving the communities involved in this case. As a result of these hearings, the appellee found a valuation for appellant's distribution system as of July 17, 1929 (date certain) in the sum of

$868,338.00, which was $381,834.00 less than the $1,250,221.00 claimed by the appellant. In arriving at its valuation, the appellee accepted the figures of the appellant as to all but six items involved in the valuation. These items and the differences in the amounts claimed by the appellant and those allowed by the appellee were as follows:

Table I.

Property Items	Claimed by Appellant	Allowed by Appellee	Difference
Organization or pre-construction cost...	$24,774.00	$00.00	$24,774.00
Cost of financing.....	39,600.00	00.00	39,600.00
Distribution line equipment	474,131.00	334,586.00	*139,545.00
Going concern value..	125,000.00	00.00	125,000.00
Undistributed construction expenditures or general overheads..	130,640.00	99,045.00	31,595.00
Working capital.....	83,200.00	61,880.00	21,320.00

In its brief, appellant (p. 4) refers to its valuation of $1,250,221.00 as having been established by the "uncontradicted evidence" and labels the amounts claimed by it and disallowed by appellee either in part or in whole, as "appellant's proof." If the purely speculative and conjectural testimony of witnesses on behalf of appellant, which, in fact, was nothing more than the guesses of such witnesses as to the amounts which in

*This difference is occasioned entirely by the disallowance of the amount claimed for cutting and restoring paving.

their opinion should be allowed for such items as organization or preconstruction cost, cost of financing, cost of cutting and restoring paving, going concern value, general overheads or undistributed construction expenditures and working capital, constitutes "uncontradicted evidence" and "proof" even though such speculations and conjectures violate well-established principles of law, then perhaps appellant's statements are correct, otherwise they are not.

During the progress of the hearing on valuation in this case, it became apparent to appellee that the purchase price of gas was of such importance that it could not pass upon the fairness of the proposed increased rates until it had determined the justness of the gateway price of gas and accordingly on November 21, 1930, appellee entered its finding and order (R., 128-134) directing appellant to produce "all the evidence available touching the cost of producing or acquiring and transmitting the gas to the several gateways and of the fairness of the gateway rate of forty-five cents (45¢)." (R., 134; P. U. R., 1931-A, 336.) At the time of the entry of said finding and order, there was pending before appellee, case numbered 5935 involving the rates for natural gas sold in the city of Columbus, (Ohio), by The Columbus Gas and Fuel Company, which is also a distributing company only, and is likewise a subsidiary of The Columbia Gas and Electric Corporation, and which company purchases its supply of natural gas from The Ohio Fuel Gas Company, (the same company which furnishes gas

to appellant), at the city gate, and after the hearing and decision in that case, a portion of the evidence offered in it was introduced by stipulation in this case, together with the finding of facts and order of the appellee in said case. (R., 138, 139.) Both the majority opinion and minority opinion of appellee in the Columbus case are found in the record. (R., 129-220, inclusive.)

Thereafter on November 3, 1932, the appellee issued its finding of facts and decision in this case, (R., 220, 225) wherein the appellee recited that it having arrived at the conclusion that the gate price to be paid by the distributing company to the producing and transporting company should be thirty-nine cents (39¢) per M c. f. (Majority Opinion, R., 222; Minority Opinion, 31.7¢ per M c. f., R., 228) it must necessarily follow that the increased rates here involved should be rejected. Such a reduction in the gateway price, naturally resulted in a reduction in appellant's annual operating expenses on account of gas purchased to the extent of $71,547.00. The entire reduction in operating expenses made by appellee

and the items involved therein, are shown by the following table:

Table II.

Item Involved	Claimed by Appellant	Allowed by Appellee	Difference
Gas purchased for resale	$536,611.00	$465,064.00	$71,547.00
General administrative expenses	38,395.00	32,432.00	5,963.00
Depreciation allowance	43,981.00	13,721.00	30,260.00
Taxes—			
Excise	9,172.00	9,163.00	9.00
Public Utilities Commission of Ohio	292.00	348.00	56.00+
Income (federal)	00.00	7,697.00	7,697.00+

Summarizing, it appears that the appellee reduced the valuation as claimed by the company $381,834.00 and operating expenses as claimed by the company $104,198.00.

A reading of appellant's statement of facts would indicate that no evidence was introduced in the Columbus Gas case (No. 5935) and incorporated into this case by stipulation (R., 135, 136, 138) to controvert the contentions of appellant. (Appellant's Brief, p. 3.) Such statements are not correct. A large amount of evidence

Note—These differences are computed on the basis of the rates which were in existence prior to the increase.

and a great many exhibits were introduced by the city of Columbus in that case in contravention of appellant's claims as to a fair gate price for gas and that evidence was stipulated into this case. (R., 135, 136, 138.)

Having found that the increased rates being collected by appellant under bond were not justified, the appellee, on November 3, 1932, ordered appellant to cease charging the rates set forth in the new schedules filed by appellant on June 17, 1929, and to refund to its consumers the difference between the rates being collected under said schedules and those in effect prior to July 17, 1929. (R., 225.)

In its statement of the case (Appellant's Brief, p. 5) appellant says that appellee found that appellant was entitled to a return of six and one-half per cent. (6½%). More correctly, the appellee found that on the basis of its valuation and operating expenses as fixed by the appellee the appellant had earned slightly in excess of 6½%. (R., 223.)

Appellant duly filed application for rehearing and also a protest against the property valuations made by appellee. The protest was dismissed and the application for rehearing denied. On December 21, 1932, appellant filed its petition in error in the court below, which, on June 1, 1933, handed down its decision affirming the order of appellant, *(The Dayton Power & Light Co. v. The Public Utilities Commission of Ohio,* 127 O. S., 137, R., 82) and stated that the principles of law necessary to the decision of this case had been considered in the case of The Columbus Gas & Fuel Company against

the Public Utilities Commission of Ohio, decided the same day, and applied to it, "the reasoning and conclusions of the law announced in the Columbus case." (R., 86.) In the Columbus case (127 O. S., 109; R., 58) the court reversed appellee, holding among other things that a gate price for the city of Columbus, of thirty-nine cents (39¢) per M c. f. was excessive. In this case, applying the conclusions of law laid down in the Columbus case, it affirmed the appellee, for it should be obvious that if a gate price of thirty-nine cents (39¢) per M c. f. would not justify the increase in rates contended for by appellant and allowed by appellee, then a leser gate price as fixed by the Supreme Court of Ohio would justify it less. In its statement, appellant alleges (Appellant's Brief, p. 6) that appellee based its rate order upon conditions as they appeared to it to be on November 3, 1932, instead as they were on July 17, 1929, the day certain. We cannot agree with this statement, and appellant neglects to cite any portion of the record to sustain this allegation.

A summary of the differences in the contentions of appellant and appellee is contained in the decision of the Supreme Court of Ohio in this case. (*The Dayton Power and Light Company v. The Public Utilities Commission of Ohio*, 127 O. S., 137; R., 82, at 84, 85.) The historical development of the case is set forth in the various orders of appellee. (R., 123-254, inclusive.)

ERRORS COMPLAINED OF AND ISSUES PRESENTED.

Under the foregoing heading at page 7 of its brief (Appellant's Brief, p. 7) appellant recites that the assignment of errors contains twenty-nine paragraphs, (R., 4-17) and that the points to be relied upon were numbered seven (R., 639-643) and that the several assignments of error and points relate to the findings and order of appellee (affirmed by the court) in (1) fixing the value of appellant's property, (2) making allowance for its operating expenses, (3) fixing rate of return to which it is entitled, and (4) directing it to refund to consumers the difference between its present and prior schedule of rates.

In this brief appellee has confined itself to answering the arguments of the appellant in its brief. Many additional arguments might have been advanced by appellee to sustain its position but in the interests of economy of time, space and money it has refrained from discussing any element not raised in the brief of appellant and in so far as possible it has followed the order of discussion set up in appellant's brief.

SUMMARY OF ARGUMENT.

I.

The Rate Base as Fixed by Appellee and Affirmed by the Court Below in the Sum of $868,387 is the Maximum Amount to Which Appellant Was Entitled Under the Law and the Evidence.

The amounts claimed by the company as to the value of the majority of the elements entering into the valuation of its distributing plant were allowed by appellee without any reduction whatever. The few items disallowed by appellee either entirely or in part are as follows:

A. Items for which no allowance made.

1. Organization or preconstruction costs.
2. Cost of financing.
3. Cost of cutting and restoring paving over pipe lines.
4. Going concern value.

Organization or preconstruction costs—No amount for organization or preconstruction costs could be justifiably allowed upon the basis of the purely speculative and conjectural testimony of the appellant's witnesses and in the absence of any evidence that such costs actually had been incurred in the past or actually would be incurred

in the future. *Denver v. Denver Union Water Company*, 246 U. S., 178; *The Los Angeles Gas and Electric Corporation v. The Railroad Commission of California, et al.*, 289 U. S., 287, 310, 77 L. Ed., 1180, 53 S. Ct., 637; *Wabash Valley Electric Company v. Young*, 287 U. S., 488, 500, 77 L. Ed., 447, 455, 53 S. Ct., 234; *Minnesota Rate Cases*, (Simpson v. Shepard), 230 U. S., 352, 452, 57 L. Ed., 1511, 1563, 33 S. Ct., 729.

Cost of financing—No allowance for cost of financing could be justifiably permitted upon the basis of the purely speculative and conjectural testimony of appellant's witnesses and in the absence of any evidence that any such cost has been incurred in the past or actually would be incurred in the future. *Wabash Valley Electric Company v. Young*, 287 U. S., 488, 500, 77 L. Ed., 447, 455, 53 S. Ct., 234; *Los Angeles Gas and Electric Corporation v. Railroad Commission of California, et al.*, 289 U. S., 287, 310, 77 L. Ed., 1180, 53 S. Ct., 637; *Galveston Electric Company v. Galveston*, 258 U. S., 388; *Vincennes Water Supply Company v. Public Service Commission*, 34 F. (2d), 5, 9; *Georgia Railway and Power Company v. Railroad Commission*, 262 U. S., 625; *Georgia Railway and Power Company v. Railroad Commission*, 278 Fed., 242; *Winona v. Wisconsin-Minnesota Light and Power Company*, 276 Fed., 996; *Portsmouth Gas Company v. Ohio Public Utilities Commission*, 119 O. S., 24, 32.

This law which is so well established by this court is not affected by the Ohio statutes and particularly Gen-

eral Code 499-9, Sub-section G. (Appendix.) *Portsmouth Gas Co. v. Ohio Public Utilities Commission,* 119 O. S., 24, 32.

Cost of cutting and restoring paving over pipe lines—The exclusion of all costs for paving cut and replaced other than that cut and replaced at the time of original installation is so clearly established that it is not now open to dispute. *Des Moines Gas Company v. Des Moines,* 238 U. S., 153; *Columbus Gas and Fuel Company v. City of Columbus,* 17 Fed. (2d), 630, 633; *Valuation of Public Service Corporations* (2d Ed., 1928), (by Robert H. Whitten and Delos F. Wilcox), (p. 778).

Going concern value—Where evidence of reproduction cost new less depreciation using current prices as of a date certain plus liberal general overheads, working capital and materials and supplies is given due consideration, in connection with other competent evidence in arriving at fair value, it is manifest that under the law going concern value has been given all the consideration it deserves and no separate allowance therefor is necessary. *Columbus Gas and Fuel Company v. Public Utilities Commission,* 127 O. S., 109, 187 N. E., 7; *Cincinnati and Suburban Bell Telephone Company v. Public Utilities Commission,* 113 O. S., 259; *Hardin-Wyandot Lighting Company v. Public Utilities Commission,* 118 O. S., 592, 603; *Portsmouth Gas Company v. Public Utilities Commission,* 119 O. S., 24; *City of Houston v. Southwestern Bell Telephone Company,* 259 U. S., 318; *Galveston Electric Company v. Galveston,* 258 U. S., 388; *Des*

Moines Gas Company v. City of Des Moines, 238 U. S., 153; *New York Telephone Company v. Prendergast*, 36 Fed. (2d), 54; *Los Angeles Gas and Electric Corporation v. Railroad Commission of California, et al.*, 289 U. S., 287, 310, 77 L. Ed., 1180, 53 S. Ct., 637.

B. Items for which a reduced allowance was made by appellee.

1. Undistributed construction expenditures or general overheads.

2. Working capital.

Undistributed construction expenditures or general overheads. In the absence of any evidence as to the actual amount of general overheads or undistributed construction expenditures made by appellant and where no evidence is introduced to show that any such costs have been capitalized on its books it was not error on the part of appellee and the court below to reduce the claim of appellant for this item from 17% to 14%, particularly when appellant's claim was based on purely speculative and conjectural testimony. The amount allowed appellee for this item (14%) exceeds the amount that has been allowed in many other cases and is ample. The recital of what may have been allowed by other commissions and courts in different places at different times and under different circumstances is of little value in determining what is a proper allowance in this case at this time and under the circumstances here involved. *Hardin-Wyandot Lighting Company v. Public Utilities Commission,*

118 O. S., 592, 610; *Portsmouth Gas Company v. Public Utilities Commission of Ohio*, 119 O. S., 24, 31; *Logan Gas Company v. Public Utilities Commission of Ohio*, 121 O. S., 507, 510; *United Fuel Gas Company v. Public Service Commission of West Virginia*, 14 Fed. (2d), 209, P. U. R., 1927A, 707 (1926) (affirmed by the Supreme Court of the United States, 278 U. S., 322).

Working capital—The amount to be allowed for working capital is a matter of judgment depending upon the circumstances in each case. Upon the basis of the evidence in this case and in the light of all the circumstances, the amount allowed by appellee and affirmed by the court below was ample. The mere statement by witnesses on behalf of the appellant that it was entitled to a working capital in an amount far in excess of its actual needs is not evidence which must be accepted by an administrative commission without question, particularly where the record discloses that the amount claimed is far in excess of the amount required to properly conduct appellant's business.

II.

Amount Allowed Appellant For Its Annual Operating Expenses Was Generous.

Appellee allowed as annual operating expenses every item claimed by appellant with the exception of the amounts claimed for cost of purchased gas, annual depreciation, taxes and administrative expenses. The total difference for annual operating expenses as claimed by

appellant and allowed by appellee was $104,198.00. (Appellant's Brief, p. 53.) Of this total difference, $71,547.00 represents a reduction in the cost of gas purchased, and $30,260.00 represents the reduction in the allowance for annual depreciation.

Administrative expenses and taxes. Appellant does not discuss the small reduction in administrative expenses and discusses the subject of taxes but briefly. The action of appellee in computing the excise tax on the basis of the tax as it existed as of July 17, 1929 (the date certain) and not on the basis of a subsequent enactment of the Legislature (April 5, 1932), is, of course, sound. Appellee made every tax allowance credit according to law for 1929 and there is nothing in the record of this case to show the revenues and expenses for this applicant for the succeeding years allocated to this area. It would be absurd to give effect in a 1929 rate study to a 1932 enactment of the Legislature.

Annual depreciation allowance. The annual depreciation allowed by appellee is ample and sufficient and represents the actual percentage used by the appellant for this item and the fairness of such an allowance is fully sustained by the record in the Columbus Gas case. Appellant claims for this item 4 per cent. of its depreciable plant, but in view of the fact that 2 per cent. represents the actual percentage used by the appellant under which percentage it has been able to maintain, in its own language "a well established utility furnishing a necessary service * * * operated upon a high efficiency

basis'' (Appellant's Brief, p. 41), its contention is not well-founded.

The cost of gas purchased. The appellant (a distributing company) is a subsidiary of The Columbia Gas and Electric Corporation. It purchases its gas at the city gates from The Ohio Fuel Gas Company, an affiliate company and likewise a subsidiary of The Columbia Gas and Electric Corporation. The amount claimed by appellant for cost of gas purchased is 45 cents per M c. f. based upon its contract with its affiliate, The Ohio Fuel Gas Company. Appellee required appellant to produce all available evidence touching the cost of producing such gas in order that it might determine the fairness of the contract price. Appellee's authority to require such evidence has been clearly established by this court. *Western Distributing Company v. Public Service Commission of the State of Kansas et al.*, 285 U. S., 119, 76 L. ed., 655, 52 S. Ct., 283; *Smith v. Illinois Bell Telephone Company*, 282 U. S., 133, 75 L. ed., 255, 51 S. Ct., 65; *State Corporation Commission v. Wichita Gas Company*, 290 U. S., ...

It is equally well established that the market value of gas is not the test as to the just price therefor in a contract made between affiliated companies operating under one common ownership. *Western Distributing Company v. Public Service Commission of the State of Kansas et al., supra; Smith v. Illinois Bell Telephone Company, supra; State Corporation Commission v. Wichita Gas Company, supra.*

Upon the evidence taken in the Columbus Gas case

(No. 5935 before the appellee) and incorporated into the record of this case by stipulation, appellee (majority) found that 39 cents per M c. f. was a fair and just price for gas at the city gates of the towns served by appellant's distributing plants (Minority 31.7 cents per M c. f.). The amount allowed appellant by appellee in this case as the cost of gas purchased exceeds by at least 7.3 cents per M c. f. the amount allowed by the lower court in the Columbus Gas case for the same item.

In arriving at a fair gate price of 39 cents per M c. f., appellee found that *the value of gas well construction* (Account 211) *and gas well equipment* (Account 212) *The Ohio Fuel Gas Company* should be fixed by deducting from the reproduction cost of said property an amount for depreciation based upon the percentage of decline in rock pressure of existing gas wells. The propriety of this method was fully established by the evidence.

In its treatment of *unoperated leaseholds—The Ohio Fuel Gas Company,* appellee found that only those leaseholds known as Class One or operated leaseholds were actually used and useful and excluded from the valuation unoperated leaseholds known as Classes Two, Three and Four. This finding affirmed by the court below was fully sustained by the evidence and the law. Section 499-9, Ohio General Code; *Logan Gas Company v. The Public Utilities Commission of Ohio,* 121 O. S., 507, 169 N. E., 575; *Logan Gas Company et al. v. The Public Utilities Commission of Ohio,* 124 O. S., 248, 249, and 177 N. E., 577; *The Columbus Gas and Fuel Company*

and the City of Columbus v. The Public Utilities Commission of Ohio, 127 O. S., 109, 187 N. E., 7 (Record, 50, 62, 63); *United Fuel Gas Company v. Public Service Commission of West Virginia*, 14 Federal (2d), 209; *United Gas and Fuel Company v. Public Service Commission of West Virginia*, 278 U. S., 322, 73 L. ed., 402, 49 S. Ct., 157; *Los Angeles Gas and Electric Company v. Railroad Commission*, 289 U. S., 287, 305; *San Diego Land and Town Company v. National City*, 174 U. S., 739, 757, 43 L. ed., 1154, 1161, 19 S. Ct., 804; *Smyth v. Ames*, 169 U. S., 466, 547 L. ed., 819, 849, 18 S. Ct., 418; *Willcox v. Consolidated Gas Co.*, 212 U. S., 19, 41, 53 L. ed., 382, 395, 29 S. Ct., 192; *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U. S., 352, 434, 57 L. ed., 1511, 1555, 33 S. Ct., 729; *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U. S., 276, 287, 67 L. ed., 981, 984, 43 S. Ct., 544; *Georgia R. & Power Co. v. Railroad Commission*, 262 U. S., 625, 631, 67 L. ed., 1144, 1147, 43 S. Ct., 680; *Bluefield Waterworks & Improvement Co. v. Public Service Commission*, 262 U. S., 679, 690, 67 L. ed., 1176, 1181, 43 S. Ct., 675; *McCardle v. Indianapolis Water Co.*, 272 U. S., 400, 410, 71 L. ed., 316, 325, 47 S. Ct., 144; and *St. Louis & O'F. R. Co. v. United States*, 279 U. S., 461, 484, 485, 73 L. ed., 798, 808, 809, 49 S. Ct., 384.

In its treatement of *operated leaseholds—The Ohio Fuel Gas Company*, it was found by appellee that appellant had failed to establish a market value for the operated acreage of The Ohio Fuel Gas Company and

that the bases assumed by the appellant's witnesses for determining value, were wholly speculative and uncertain. It must be remembered that these leaseholds are being used in a regulated utility business where rates to be charged consumers cannot be built up by employing a value that depends on earning capacity. Under the evidence and the law, with the burden of proof resting upon the appellant, the value for this item could not reasonably by fixed at an amount greater than the book value assigned by The Ohio Fuel Gas Company, though, as a matter of fact, the amount allowed appellant for this item by appellee exceeded the book value therefor, by approximately $2,500,000.00. *United Fuel Gas Company v. Public Service Commission of West Virginia,* 14 Federal (2d), 209; *City of Charleston v. Public Service Commission,* 110 W. Va., 245, P. U. R. 1931 E-74; *United Fuel Gas Company et al. v. Railroad Commission of Kentucky,* 278 U. S., 300, 417, 73 L. Ed., 390, 49 S. Ct., 150; *Logan Gas Company, et al. v. Public Utilities Commission of Ohio,* 124 O. S., 248, 249, 177 N. E., 577.

In its treatment of *amortization and depreciation—The Ohio Fuel Gas Company,* appellee made an allowance of $4,158,954.00 for amortization. The lower court in the case of *The Columbus Gas and Fuel Company v. The Public Utilities Commission of Ohio, et al.,* 127 O. S., 109, 187 N. E., 7, disallowed this item. However, in this case, even on the basis of inclusion of the item, the gate price for cost of gas purchased was found to be insufficient to authorize appellant's application for an increase in its rates.

In its treatment of *delay rentals on unoperated leaseholds—The Ohio Fuel Gas Company*, appellee found that no allowance for the annual rentals paid by The Ohio Fuel Gas Company on its unoperated leaseholds could be included. Since the unoperated acreage cannot be included legally in the valuation, it necessarily follows that the expenses of carrying it, known as "delay rentals" cannot be charged as an operating expense against existing gas consumers. The finding of the appellee in this respect was properly affirmed by the court below. *The Columbus Gas and Fuel Company v. The Public Utilities Commission of Ohio*, 127 O. S., 109, 187 N. E., 7. (R., 58.)

III.

A Minimum Rate of Return of 6½% for the Period From July 17, 1929 Down to the Present Time Is Fair and Reasonable and Is Not Confiscatory.

The contention of the appellant that it is entitled to a minimum rate of return of 8% for the period from July 17, 1921 down to the present time is entirely unwarranted. The return allowed by the appellee and affirmed by the court for the period in question under the circumstances in this case does not result in confiscation of appellant's property. *Smith v. Illinois Bell Telephone Company*, 282 U. S., 133, 75 L. ed., 255, 51 S. Ct., 65; *Chesapeake and Potomac Telephone Company v. Whitman*, 3 Fed., 938, 953; *Wabash Valley Electric Company v. Young*, 287 U. S., 488, 77 L. ed., 447, 53 S. Ct.,

234; *Los Angeles Gas and Electric Company v. Railroad Commission of California, et al.*, 289 U. S., 287, 77 L. ed., 1180, 53 S. Ct., 637; *Illinois Bell Telephone Company v. Gilbert, et al.*, 3 Fed. Sup., 595; *Atchison-Topeka and Santa Fe Railway Company v. United States*, 284 U. S., 248. The contention of the appellant that it is entitled to an unusually high rate of return on the basis of the hazardous nature of the gas business is based upon a theory which has long since been exploded.

IV.

The Order of the Appellee Affirmed by the Lower Court Requiring Appellant to Refund the Difference in the Amount Collected Under the Increased Rates Effective July 17, 1929 and the Rates That Were in Existence Prior to That Date Is Fully Sustained Under the Law and Evidence Applicable to This Case.

It is apparent that if the decision of the appellee, which was affirmed by the court below, is correct, then the order of refund is entirely proper. The entire question presented in this case is as to whether or not appellant's increased schedule of rates filed effective July 17, 1929, was justified. The appellee and the lower court having found that they were not, appellant under the provisions of the Pence Law (Section 614-20 prior to July 18, 1929, Appendix) is bound to refund to its consumers the excess rates found to have been collected by it thereunder.

V.

The Court Below Thoroughly Reviewed the Finding and Order of the Appellee in This Case and on Basis of Such Review Affirmed the Order of Appellee.

The contention of the appellant that the court below did not consider the testimony and exercise its own independent judgment thereon is without merit and is not worthy of serious consideration.

VI.

The Appellant Was Not Entitled to a Rehearing.

The contention that the finding of the court below to the effect that the laws of Ohio make no allowance for amortization as distinguished from depreciation is of no consequence in this case for upon the basis of an allowance for amortization of $4,158,954 by appellee still the appellee found that the increased rates as set forth in appellant's application filed with appellee on June 18, 1929, were not justified. If the disallowance of this item by the court below was correct, then the rate of return to appellee in this case under its old rates is considerably increased over and above the amount to which appellee held that it was entitled.

ARGUMENT

I.

VALUATION OF APPELLANT'S PROPERTY.

1. The Contention that the Court Erred in Making No Allowance for Appellant's Organization or Preconstruction Costs.

No amount for organization or preconstruction costs could be justifiably allowed upon the basis of the purely speculative and conjectural testimony of appellant's witnesses and in the absence of any evidence that such costs actually had been incurred in the past or actually would be incurred in the future.

This item in the amount of $24,774.00, as claimed by the appellant, is presumed to represent preorganization costs which have been or might be incurred by the appellant in reproducing its property. In the classified system of accounts, it is known as Account 200. The annual reports filed with the appellee by the appellant reveal that nothing is shown on the books of the appellant for this account.

It should be remembered that the appellant is purely a local distributing company receiving its gas at the city gate and when the territory concerned in this procedure is considered, involving as it does eight small towns and approximately 14,000 consumers, the fallacy of the appellant's contentions in this regard becomes apparent.

If we are to reconstruct the plant of the appellant in these territories as of 1929 or 1930; it is perfectly proper to consider the remainder of the appellant company as in existence. It is equally proper to consider the public of these communities anxious and desirous of receiving the service which they now enjoy. All of the items which the appellant's engineers testify as being necessary to consider would be known.

It is absurd to discuss such matters as preliminary determination of rates and supply of gas as contained in the testimony of Mr. Emery (R., 281 and 282) when all these facts are known in advance. This item, in so far as it is involved in this case, is so purely theoretical that it was wholly disregarded in the light of the testimony of the appellant's witnesses, coupled with the fact that the appellant has never experienced such costs so that they now appear on the books of the company.

To say that this appellant, serving the city of Dayton and other centers, would expend the sum of $24,774.00 before it had determined to extend its service to the communities herein concerned would be to wholly disregard the existing conditions as of the date certain.

Nor do we agree with the statement of counsel for appellant that commissions and courts have quite uniformly recognized the necessity of including an adequate allowance to cover this item in the valuation of utility property. (Appellant's Brief, p. 24.)

In *Denver v. Denver Union Water Company* (246 U. S., 178), the findings of the master were approved by

this court and the method of valuation which he adopted was expressly commended. In his valuation, the master made an allowance of 12½ per cent. on the structural cost of the property for "engineering and contingencies" and allowed no other general overheads except interest during construction. An item for "preliminary expenses and organization" was disallowed, (Master's Report, pp. 21-22), with the following statement:

> "The water company (Ex. C, page 64) claims that $120,000, on account of 'preliminary expenses and organization,' should be included in the estimate of the value of the property it is using to serve the public. Mr. Metcalf explained this item as follows (Vol. 4 (C), page 1700):
>
> 'That item is assumed to cover the expenses of preliminary investigation by engineers and others, the incidental legal work, the formation work, if you like; the work of acquiring the franchise—that is, the legal work—filings, attendance on meetings incident to that, and, in short the general preliminary expenses which might be incurred incidental to an investigation of the project and the organization of the corporation.'
>
> The witness further states that in his judgment, the amount was reasonable, conservative.
>
> The allowance elsewhere made for the company's engineering and contingencies is, in my judgment, reasonably sufficient to cover all preliminary investigation by engineers and others. No franchise exists in this case and the cost of its acquisition cannot be allowed. This item is disallowed."

The Denver case was decided approximately three years later than the case of the *Des Moines Gas Company v. Des Moines* (238 U. S., 153) referred to by appellant.

It is interesting to note that in the Des Moines case, while the court apparently approved an item of $6923.00 for organization expenses, allowed by the master, that the master had made a specific allowance for organization in that case because, as he said, the organization expenses were shown to have been $6923.00, i. e., he took the actual proven experience of the company for this item.

The only other decision of this court cited by appellant to sustain its position as to this item is the case of *The Ohio Utilities Company v. Public Utilities Commission* (267 U. S., 359). That case is clearly distinguishable from the instant case, for the reason that in The Ohio Utilities Company case there was evidence in the record testified to by the commission's own engineers that an allowance for organization costs should be made.

There is no such evidence in this record, and the fact that it should not be allowed, we believe, is recognized by the Columbus company who does not even ask for it. A purely distributing company such as the appellant surely would not experience such an expense, and the wholly speculative testimony of Mr. Lerch, Mr. Hamilton and Mr. Emery on behalf of the appellant (R., 269-286) was not sufficient to have justified the appellee in allowing this item.

The position of the appellee in disallowing the item, we believe, is fully sustained by the decision of this court in *The Los Angeles Gas and Electric Corporation v. The Railroad Commission of California, et al.*, 289 U. S., 287,

310, 77 L. Ed., 1180, 53 S. Ct., 637, decided May 8, 1933, wherein this court held as follows:

> "6. Coming to cost of reproduction, we agree with the court below that the items included in the company's estimate for 'cost of financing, $5,921,-470,' and 'promoters' remuneration, $2,500,000,' were too conjectural to be allowed. Wabash Valley Electric Co. v. Young, 287 U. S., 488, 500, ante, 447, 53 S. Ct., 234."

Similarly this court stated in Minnesota rate cases, *Simpson v. Shepard*, 230 U. S., 352, 452, 57 L. Ed., 1511, 1563, 33 S. Ct., 729:

> "The cost-of-reproduction method is of service in ascertaining the present value of the plant when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture."

The purely conjectural nature of the testimony of the appellant's witnesses, in the instant case, is well illustrated by Witness Emery who at the conclusion of his testimony, under questioning by the appellee, admitted that the estimate he had made for this particular item of organization or preconstruction costs would be the same irrespective of whether or not the property in question was being reconstructed as a single unit or whether this property was being reconstructed as a part of The Dayton Power and Light Company, (R., 286),

which company counsel for the appellant, in their brief, refer to in the following language:

> "Appellant is a well-established utility, furnishing a necessary service and was shown to be operated on a high efficiency basis." (Appellant's Brief, p. 41.)

Upon the record in this case and the law appellee was fully justified in disallowing this item.

2. The Contention that the Court Erred in Making No Allowance for Appellant's Cost of Financing.

No allowance for costs of financing could be justifiably permitted upon the purely speculative and conjectural testimony of appellant's witnesses and in the absence of any evidence that such costs actually had been incurred in the past or actually would be incurred in the future.

The appellant claims $39,600 for this item. Again it disregards existing facts. The testimony of the appellant's witnesses is based upon erroneous assumptions of fact and is so speculative and theoretical as to be without probative value. The four witnesses whom the appellant introduced in this connection all sought to substantiate an allowance of 4% of the cost of physical property as the cost of obtaining the money necessary to build it. None of these witnesses gave any consideration to the excellent financial condition of the appellant company as a whole but assumed that they were starting out with a new company having no affiliations and no banking connections. The appellee in reaching its deci-

sion to disallow the amount claimed for cost of financing determined to consider some of the actualities rather than indulge wholly in theory.

No testimony was introduced by any of the witnesses for the appellant as to any actual expenditure incurred by appellant and carried on its books as a cost of financing the property under consideration. On the contrary, each witness admitted that his calculations were purely on a basis of his estimate of cost of financing. This testimony which is contained in the record (R., 286-341) is entirely speculative and conjectural and, in our opinion, comes clearly within the rule announced by this court in the recently decided case of *Wabash Valley Electric Company v. Young*, 287 U. S., 488, 500, 77 L. Ed., 447, P. U. R., 1933A, 433, 53 S. Ct., 234, and the still more recent decision of this court in the case of *Los Angeles Gas and Electric Corporation v. Railroad Commission of California, et al.*, 289 U. S., 287, 77 L. Ed., 1180, 53 S. Ct., 637.

In the Wabash case this court at page 500 said:

> "Complaint is made that in determining the value of the Martinsville property no allowance was made for cost of financing. As the court below, however, pointed out, there was no evidence that such cost was incurred, or that it necessarily would be incurred in the event of reconstruction. This is also in accordance with the findings of the master. We see no reason to interfere."

In the Los Angeles case the court at page 310 said:

> "Coming to the cost of reproduction, we agree with the court below that the items included in the company's estimate for 'cost of financing $5,921,-

470,' and 'promoters' remuneration $2,500,000,' were too conjectural to be allowed."

In other words, in two of the most recent decisions of this court cost of financing based upon estimates made without any actual evidence that such costs would be incurred were disallowed. Significantly enough, the appellant in its brief covering this item has sought elsewhere than the decisions of this court for some authority to sustain its contention for the allowance of the 4% claimed as a cost of financing. They attempt (Appellant's Brief, p. 33) to differentiate the decision of this court in *Wabash Valley Electric Company v. Young*, 287 U.S., 488, 500, from the present case. A study of the two cases, however, fails to reveal any dissimilarity. As has been heretofore indicated, the evidence of appellant's witnesses as to cost of financing was not based upon any actual costs incurred in connection with the property under consideration or what would be incurred in connection with this property but was confined to a general statement of a fixed percentage which they claim is usually incurred in the reproduction of a public utility's property. (R., 289, 308.)

Counsel for appellant failed to make any mention in their brief of the decision of this court in *The Los Angeles Gas and Electric Corporation v. Railroad Commission of California, et al.*, 289 U. S., 287, 53 S. Ct., 637, 77 L. Ed., 1180.

If additional authority were needed to sustain the appellee's action in disallowing this item it could be found

in *Galveston Electric Company v. Galveston*, 258 U. S., 388, wherein this court affirmed the decree of the United States District Court for the Southern District of Texas, disallowing an item of $67,078 for brokerage which had been allowed by the master. This court in its opinion approving the exclusion of the item at page 397 said:

> "The finding of the master rests upon testimony that bankers customarily get, in some form, compensation equal to 4% on the money procured by them for such enterprises."

It will be observed that the amount disallowed by this court in that case was identically the same amount that was disallowed by the appellee in this case and that the testimony upon which the allowance was originally made by the master in the Galveston case was similar to the testimony upon which the appellant relies in this case.

In *Vincennes Water Supply Company v. Public Service Commission*, 34 F. (2d), 5, 9, cited with approval by this court in *Wabash Valley Electric Company v. Young*, 287 U. S., 488, 500, the court in disallowing the amount claimed for cost of financing, said:

> "Appellant contends there should be included in the valuation an item of $65,000 for cost of financing, and, while there may be circumstances under which consideration of such an item is proper, there is no fact in this record that would establish the propriety of such inclusion. It has not been shown that there has been any expense in the financing, and if there has been none, none should be included."

Numerous other decisions of the federal courts might be cited further sustaining the action of the appellee in

disallowing the cost of financing claims of the appellant in this case. In *Georgia Railway and Power Company v. Railroad Commission,* 278 Fed., 242, the court disallowed the sum of $500,000 claimed by the company for cost of original financing and this decision by the District Court was affirmed by this court in *Georgia Railway and Power Company v. Railroad Commission,* 262 U. S., 625, although on the appeal to this court in that case the item for cost of financing does not seem to have been stressed by the company. In *Winona v. Wisconsin-Minnesota Light and Power Company,* 276 Fed., 996, the entire cost of financing claimed by the company was eliminated.

The court in its decision at page 1004 uses the following language which is peculiarly significant in the instant case:

> "I have eliminated entirely the item of cost of financing. Not but what such an item is proper in cases where the evidence shows such expense was incurred, but I have been unable to find any such evidence in the present record. There is evidence as to what the cost of financing would be in a reproduction of the present plant on the different bases proposed but, in my judgment, this is not enough. The reproduction method may theoretically call for such an item as cost of financing, but in making a reasonable valuation for rate-making purposes, I do not think that items which are theoretical only, so far as the case in hand is concerned, should have any place."

It is equally well settled in Ohio that cost of financing cannot be included in the rate base. *Portsmouth Gas Company v. Ohio Public Utilities Commission,* 119 O. S., 24, 32 (1928).

It seems peculiarly significant that the only decision of this court cited by counsel for appellant to sustain its contention for the inclusion of the item covering the cost of financing is *Ohio Valley Water Company v. Ben Avon Borough*, 253 U. S., 287, decided in 1920 prior to any of the decisions hereinbefore quoted and in which this court did not pass upon the merits of the valuation involved.

3. The Contention that the Court Erred in Disallowing the Cost of Cutting and Restoring Pavement Over Mains and Service Lines in the Valuation of Appellant's Property.

The exclusion of all costs for paving cut and replaced, other than that cut and replaced at the time of the original installation is so clearly established that it is not now open to dispute.

The appellant in its account for distribution line equipment claim the sum of $474,131.00. This account was reduced by appellee to $334,586.00, or a total reduction of $139,545.00. This entire reduction represents the cost of cutting and restoring paving over mains and service lines which was admittedly not in existence at the time of the original laying. (R., 354, 361.) In other words, the company now seeks in this case to secure a reversal of the universally accepted principle as laid down by this court in *Des Moines Gas Company v. Des Moines*, 238 U. S., 153, where this court approved the exclusion of an item of $140,000 for pavements which had not been disturbed in actual construction.

In *Valuation of Public Service Corporations*, (2d Ed.,

1928), by Robert H. Whitten and Delos F. Wilcox, it is said (p. 778):

> "The law seems to be settled against the inclusion of the cost of cutting and replacing pavement as a part of the rate base or as an element in just compensation, except to the extent that the utility has in fact been compelled to incur such an expense in the construction or reconstruction of its system."

The language of this court in *The Des Moines Gas Company v. City of Des Moines, supra,* is so clear that no room for doubt is left as to the propriety of the action of the appellee in disallowing the amount claimed for cutting and restoring pavement over mains and service lines where there was no evidence anywhere in the record to indicate that the utility had been compelled to incur such expense in the construction or reconstruction of its system.

Again it is significant that the only cases cited by appellant in connection with this item are *Regan v. Farmers Loan and Trust Company,* 154 U. S., 362, 410, (Appellant's Brief, p. 37), and *Willcox v. Consolidated Gas Company,* 212 U. S., 19, 52, (Appellant's Brief, p. 38), neither of which sustain the contention of the plaintiff and both of which were decided long before *Des Moines Gas Company v. City of Des Moines,* 238 U. S., 153. In what appears to be sheer desperation, appellant attempts to sustain its contention, first, upon the theory that such a cost has been allowed in condemnation cases and, second, upon an attempt to give a strained construction to the Ohio statute. (See 499-9, General Code, Subsection

G, Appendix.) As to this first contention, in the very authority relied upon by appellant, *Wichita Water Company v. Wichita*, 271 Fed., 973, 976, the court sustained the general rule disallowing this particular item distinguishing the Des Moines case in the following language:

> "Yet the question in that case was one of just rates of service to be charged the consumers of gas."

Certainly counsel for appellant does not contend that this is not a case which involves just rates of service to be charged consumers of gas.

In *Columbus Gas and Fuel Company v. City of Columbus*, 17 Fed. (2d), 630, at page 633, the court made the following statement:

> "The company contends that, under the reproduction new theory, the cost of cutting and replacing all pavement that, at the time of the appraisement, which had been constructed over the mains in the natural gas system, properly entered into the reproduction cost new. On the other hand, the city claims that only such pavement as was cut at the time of original installation should now be carried in that value. The master's finding is in accord with the city's contention, and is correct. Rate-making bodies have been confronted with this question, and the weight of these holdings is so strong that the exclusion of all costs for paving cut and replaced, other than that cut and replaced at the time of the original installation, has become the almost universal rule. Spurr, Principles of Public Service Regulation, Volume 2, c. 26; Des Moines Gas Company v. Des Moines, 238 U. S., 153, 171, 35 S. Ct., 811, 59 L. Ed., 1244."

A more decisive statement on this item can not be conceived and this statement is of even greater im-

portance when it is considered that the utility there involved was an Ohio utility subject to the same Ohio statute which appellant claims exempts the application of this rule which is almost universally applicable. Of even greater significance perhaps is the fact that in the Columbus Gas case, now pending before this court, (The Columbus Gas & Fuel Company, Appellant v. Public Utilities Commission of Ohio, and the City of Columbus, Ohio, October Term, 1933, No. 608), no allowance for this item is claimed by the company, such an allowance having been claimed before the appellee and the lower court but abandoned in this court. It should be remembered that there is no dispute over the dollar amounts as claimed by the appellant and as allowed by the appellee covering this item but simply over the principle involved. To sustain the contention of the appellant in this regard woudl require a reversal not only of the Ohio rule, but of the federal rule and the rule of this court as well.

4. The Contention that the Court Erred in Not Making Allowance in the Rate Base for Appellant's Going Concern Value.

Where evidence of reproduction cost new less depreciation, using current prices as of the date certain, plus liberal general overheads, working capital and materials and supplies is given due consideration in connection with other competent evidence in arriving at fair value, it is manifest that under the law, going concern value has been given all the consideration it deserves and no separate allowance therefor is necessary.

The appellant in its brief filed herein refers to its proved going concern value. This "proved going concern value" apparently rests upon the testimony of Witnesses F. H. Lerch, Jr. (R., 364), F. C. Hamilton (R., 389) and James A. Emery (R., 426). On the basis of the testimony of these witnesses the appellant claims the round sum of $125,000 for this item. One witness (Hamilton) estimated this item at from $14.00 (R., 423) to $10.00 (R., 426) per customer for the total of 14,019 customers. Another witness (Lerch) arrived at going concern value by taking 10% of the total property on a reproduction new basis. (R., 365, 366.) This graphically illustrates the theoretical nature of the testimony of the appellant's witnesses. The testimony of Witness Lerch is particularly intriguing. He first states (R., 365) that going concern is a very difficult matter to compute mathematically and says he has not attempted to do it in this case. He merely recites that in his opinion going con-

cern value in this case is a very substantial item of cost. He then proceeds to say that in accordance with the general practice of commissions and courts he had computed the going concern value of the property under consideration to be at least 10%. Upon further questioning he admits (R., 366) that he has arrived at his estimate of going concern value for a total of $125,000 by taking 14,000 consumers and multiplying these consumers by nine and a fraction dollars. He seems to overlook the fact that 14,000 consumers multiplied by nine and a fraction dollars would give him a greater amount than the total which he claims. Upon questioning by the appellee (R., 366), he next admits that his figure of $9.00 per customer is merely a conclusion and when pressed by the appellee (R., 371) as to why he has used 10% rather than some lesser per cent. he replies that he has used 10% for the same reason the courts and commissions have used that figure. Then when pressed by the appellee as to whether or not his testimony was not based upon the going concern value in connection with the particular property under consideration but rather upon his knowledge of what somebody else had said was the correct per cent., he repudiates all his former testimony and replies that it is based upon his own experience. Again when asked by the appellee (R., 371-372) as to why he had allowed 10% instead of 5% he simply stated that he thought that it was what should be allowed and then finally he admits (R., 381-382) that the $125,000 testified to by him as a proper element for going concern value was not his own conclusion at all, but was rather the

conclusion he had received from another witness. His testimony, therefore, becomes entirely valueless to the appellant but we believe it is of particular value to the appellee as illustrative of the unreliable quality of the testimony introduced by the appellant to sustain its claim for going concern value.

The testimony of the other two witnesses was not of much greater value. Mr. Emery, on whom counsel for appellant placed their chief reliance, prepared an exhibit identified as "Company Exhibit No. 7," to which the attention of this court is invited. It is founded on principles which were definitely rejected by a three-judge court in the case of *New York Telephone Company v. Prendergast*, 36 Fed. (2d), 54, wherein that court at page 64 of its decision made the following statement:

> "The master found that the plaintiff was entitled to the valuation as a going concern of $26,000,000 in the city of New York and $9,000,000 outside of the city. While the plaintiff is well managed and has built up a large business with a trained force of employees, who are found capable and expeditious in the discharge of its service to the public, still the allowance by the master was excessive. McCardle v. Indianapolis Water Co., 272 U. S., 400; Houston v. Southwestern Bell Tel. Co., 259 U. S., 318; Kings County Lighting Co. v. Prendergast (D. C.), 7 F. (2nd), 192; New York Tel. Co. v. Prendergast (D. C.), 300 F., 822.
>
> The commission, after the decision granting the injunction pendente lite by this court, allowed $10,000,000 for going value—$7,500,000 in the city of New York, and $2,500,000 outside the city. Some items which the master considered, we think improperly, led him to these conclusions. Plaintiff's claim, which the master considered, that $19,000,000

was required to train its force of employees to their present efficiency, had previously been treated as a cost of operation. That treatment was proper. It proved $5,500,000 for developing records, files, etc., and $4,000,000 for record of subscribers and directories. These expenses were charged up to operating costs. They may not be charged both as expense of operation and as an acquisition of capital. $9,500,000 was considered as the hypothetical cost of advertising and canvassing to get subscribers. This was a cost for creating good will and a regulated utility cannot estimate good will into its rate base. Galveston Elec. Co. v. Galveston, 258 U. S., 388. The claim of $9,500,000, consisting of items for maintenance, depreciation, interest, and taxes between completion of the hypothetically reconstructed plant and the time when it would be running at normal operating capacity, was found by the master to be too speculative. The allowance made by the commission for going concern value was soundly based, and therefore we modify the amount allowed by the master of $10,000,000."

Mr. Emery has divided his theoretical costs into two groups, with subdivisions in each. We quote one statement appearing at the top of page 16 of Exhibit No. 7 as follows:

"Though as an accounting matter, the above costs (referring to new business costs) may have been carried as operating expenses, the actual effect of so charging them was to decrease the net earnings and the resultant return to the stockholders, and as a consequence, these costs were thus really paid for by the stockholders of the company."

The fallacy of such reasoning is self-evident, and yet it dominates the entire exhibit. The appellant would have

us disregard the fact that trained employes are just as much physically in existence as of a date certain as the necessary materials such as pipes, etc. When such employes are hired, their degree of training is evidenced by their salary. Under the appellant's theory, they would capitalize the cost of such theoretical training, thus making the rate-payer pay a return on such amount, and then charge as operating expense the total amount of his salary.

As to the first group of hypothetical costs involving the so-called cost of attaching business and of attaching personnel, it is submitted that Exhibit No. 7 discredits itself.

The next item on which Mr. Emery seeks to create a value is termed the cost of adjusting physical property. In other words, after we have literally reconstructed the existing plant just as it is, he desires to have us assume that there would be a certain amount of "trying out" and adjusting to produce the most satisfactory degree of service. Again they seek to capitalize something which has been paid for as an operating expense or else is non-existent.

The last item to which he attributes a value, he terms unification value. In substance, he says (Exhibit No. 7, page 27), that considering the fact that the present Dayton Power and Light Company is a consolidation of separately operating systems, he believes the unified system has an added element of intangible value of not less than $250,000.00, one-seventh of which he allocates to the towns involved in this proceeding. This is the last

step in the repetition of building up so-called values, none of which appear on the books of the appellant in its capital account. For good measure, he refers to a value of developed and potential business, to which he assigns no definite value. On such testimony as that, they now ask this court to add to the appellee's value, the sum of $125,000.00.

An examination of the record will show clearly how the appellee sought to ascertain the clerical costs of adding the present existing subscribers to the theoretically reconstructed lines of the appellant, but without success. It is submitted that the burden of proving going concern value rests on the appellant, and that the character of the testimony of the appellant's witnesses on this point required the appellee to disregard it.

Counsel for appellant has heretofore called the attention of this court to the Ohio statutes dealing with the question of valuation. The valuation formula prescribed by the Legislature of the state of Ohio does not permit an inclusion of a separate allowance for going concern value in the determination of fair value for rate fixing purposes. (Ohio G. C., 499-8, 499-9, 614-46; *Columbus Gas & Fuel Co. v. Public Utilities Commission*, 127 O. S., 109, 187 N. E., 7, P. U. R., 1933D, 238.) But laying to one side this controlling consideration, it is clear that where fair value is fixed upon evidence such as was before the appellee, no additional separate allowance for going concern value is admissible as a matter of law and that, were this not so as it is, the appellant has wholly failed to sustain the burden of establishing any separate

element of going concern value by evidence either competent or of probative value. The law is well settled, both under the decisions of the Supreme Court of Ohio and of the Supreme Court of the United States, that where the property of a utility is valued, not as junk or property lacking utility, but as a going plant in successful operation, the element of going value has been given all the consideration which it deserves, and no additional separate allowance for going concern value is permissible. *Cincinnati & Suburban Bell Telephone Co. v. Public Utilities Commission*, 113 O. S., 259; *The Hardin-Wyandot Lighting Co. v. Public Utilities Commission*, 118 O. S., 592, 603; *Portsmouth Gas Co. v. Public Utilities Commission*, 119 O. S., 24; *Columbus Gas & Fuel Co. v. Public Utilities Commission*, 127 O. S., 109, P. U. R., 1933D, 238, 247-8; *City of Houston v. Southwestern Bell Telephone Co.*, 259 U. S., 318; *Galveston Electric Co. v. Galveston*, 258 U. S., 388; *Des Moines Gas Co. v. City of Des Moines*, 238 U. S., 153. Indeed it is a matter of record that every valuation made by the appellee since 1917, which included a separate allowance for going concern value has been appealed to the Ohio Supreme Court and that the latter tribunal has without exception struck out every such allowance; and it is also a matter of record that no valuation made by appellee which omitted such an allowance has ever been declared invalid on appeal to the Ohio Supreme Court because of the absence of such an allowance. Where evidence of reproduction cost new less depreciation, using current prices as of the date certain, plus liberal general overheads, working capital

and materials and supplies is given due consideration in connection with other competent evidence in arriving at fair value, it is manifest that under the law, as stated by the foregoing authorities, going concern value has been given all the consideration it deserves. The basic fallacy in the appellant's position is that it attempts to add a separate allowance for going concern value not to evidence of fair value of property considered as junk, disconnected units or without business attached, without earnings or prospects of earnings but to a fair value for a plant in full operation with customers attached and earning money. It must be manifest to the most naive that if the plant of the appellant or any plant were valued as junk, or as property unassembled, or as property without customers attached, without established business, and without earnings, such a value would inevitably be only a fraction of the reproduction cost new less accrued depreciation as estimated in this and ordinary utility rate cases. Manifestly, such a plant would be so lacking in utility that not even the most ardent representative of utility interests could contend that its fair value was anything approaching reproduction cost new of the physical property plus general overheads, material and supplies, and working capital. The fact manifestly is that where due consideration is given to reproduction cost new at current prices, less accrued depreciation, plus general overheads, material and supplies, and working capital, in connection with any other competent testimony, in arriving at the fair present value for rate making purposes, that utility property has been valued as a going

concern with every element of going concern value given all the weight that it deserves, and that no separate and additional allowance for going concern value may be made without a manifest duplication. That unquestionably is the reason why the statutes of Ohio provide, as one element to be found and considered by the commission, the reproduction cost new less accrued depreciation and do not provide for or permit any separate additional allowance for so-called going concern value.

While it is thus manifest that no separate allowance for going concern value could be sustained in addition to that which is reflected by the evidence in this case of reproduction cost new plus general overheads, were that not so as it is, the appellant would wholly fail to sustain the burden of proof which rests upon it by evidence either competent or of probative value in support of its claim of a separate allowance for going concern value.

Not a single capital expenditure is cited for an additional and separate allowance for going concern value but rather the entire claim of the appellant was predicated upon the testimony of the three witnesses hereinbefore referred to which was wholly speculative and conjectural and was properly disallowed by the appellee.

Los Angeles Gas & Electric Corp. v. Railroad Commission of California, 289 U. S. 287, 77 L. Ed., 1180, 53 S. Ct., 637.

5. The Contention that the Court Erred in Reducing Appellant's Undistributed Construction Expenditures From $130,640.00 to $99,045.00.

In the absence of any evidence as to the actual amount of general overheads on undistributed construction expenditures experienced by appellant and where no evidence is introduced to show that any of such costs have been capitalized on its books it was not error on the part of appellee and the court below to reduce the claim of appellant for this item from 17% to 14% particularly when appellant's claim was based on purely speculative and conjectural testimony.

It is the contention of the appellant that the appellee disregarded the evidence on this subject when it used 14 per cent. of the value of the physical property as found by it as a proper allowance for this item.

This amount allowed by the appellee was the same as that allowed The Ohio Fuel Gas Company in the Columbus case and was more than the allowance made in The Columbus Gas and Fuel Company case. This allowance was approved by the Supreme Court of Ohi in its decision. (127 O. S., 141; R., 58.)

The testimony which appellant claims that the appellee disregarded in making this allowance for undistributed construction expenditures, or general overheads, is found in the record at pages 458 to 474, inclusive, where Witnesses F. H. Lerch, Jr., F. C. Hamilton and Frank Parker testified that in a theoretical reconstruction of a public utility property, an allowance in the neighborhood of 17

per. cent. for general overheads, or undistributed construction expenditures, should be made.

If we follow the argument of appellant correctly, it would seem that appellee is bound to accept these guesses made by appellant's witnesses. In so far as we are able to discover, no evidence was introduced to the effect that any of these costs had been capitalized on the books of the company or that there was any experience on the part of this company that the general overheads, or undistributed construction expenditures, aggregated 17 per cent.

The purely conjectural nature of the testimony of appellant's witnesses is again well illustrated by Witness Lerch who, in reply to questions from the appellee, stated in substance that his allowance for this item was based upon general usage and custom. (R., 466.)

Appellant, in its brief, apparently adopts the same theory when, to sustain its contention, it cites a number of cases approving allowances approximating 17 per cent. for this particular item.

We do not believe there is any particular value in citations of what some other courts and some other commissions may have allowed for this item in cases before them, but if there were we might make mention of the fact that the Supreme Court of Ohio in numerous cases has sustained an allowance by the appellee of 7 per cent. for general overheads which is just one-half of the amount allowed in this case. *Hardin-Wyandot Lighting Company v. Public Utilities Commission,* 118 O. S., 592, 610; *Portsmouth Gas Company v. Public Utilities Com-*

mission of Ohio, 119 O. S., 24, 31; *Logan Gas Company v. Public Utilities Commission of Ohio*, 121 O. S., 507, 510.

It should be remembered that the allowance for this item is purely a judgment allowance, and we are of the opinion that the appellee was entirely justified in making an allowance of 14 per cent., and that such an allowance is more than ample.

The unreliability of reproduction cost estimate of overheads is well illustrated in *The United Fuel Gas Company v. Public Service Commission of West Virginia*, 14 Fed. (2d), 209, P. U. R., 1927A, 707 (1926) (affirmed by the Supreme Court of the United States, 278 U. S., 322), at page 214, where Judge Rose, speaking for the majority, said:

> "* * * There is no possible question that in almost all of these rate cases the overhead charges included in the estimated cost of reproduction greatly exceed any sum that the utility actually paid out for such purposes. A large and widely distributed plant is ordinarily a growth extending over many years. Its property is managed by its officers, and its construction is financed in installments. *The large overheads estimated by the experts are simply not incurred.* * * *" (Italics ours.)

6. The Contention that the Court Erred in Reducing Appellant's Claim for Working Capital From $82,200.00 to $61,880.00.

The amount to be allowed for working capital is a matter of judgment depending upon the circumstances in each case. Upon the basis of the evidence in this case and in the light of all the circumstances the amount allowed by appellee and affirmed by the court below was ample.

The fairness of the appellee's allowance for this item is not open to serious dispute. The precise manner in which the allowance for working capital was arrived at by the appellee is contained in its order. (R., 224.)

One and one-half month's operating expense, excluding gas purchased and depreciation allowance, was first allowed in the amount of $17,107.00, which, if we read the record correctly, is the amount testified to by F. C. Hamilton, one of the appellant's two witnesses on this subject. Then, one month's gas purchase was allowed in the amount of $38,755.00, and material and supplies, as claimed by the appellee, in the amount of $5218.00 (R., 454) were allowed.

These amounts total the allowance made by the appellee. The only difference between that and the appellant's claimed amount is that they seek operating expenses for two months plus $10,000.00 cash, which of course is wholly unwarranted, inasmuch as their bills are payable monthly and if they have a sufficient allowance for every operating expense for one month and a

half, they do not need and are not entitled to any additional cash allowance.

The appellant, in its very brief discussion of this matter (Appellant's Brief, page 51), cites *Vincennes Water Supply Company v. Public Service Commission*, 34 F. (2d), 5, 8, as authority for the allowance of some amount for working capital.

There is no dispute between appellant and appellee that some amount should be allowed for working capital. The only point of difference is the amount that should be allowed for this item.

We respectfully submit that the amount allowed by appellee for working capital was entirely fair and reasonable.

In conclusion, reference should again be made to the largely conjectural nature of the testimony of the appellant's witnesses as to this item, as illustrated by the testimony of Witness Lerch. (R., 456, 457.)

II.

APPELLANT'S OPERATING EXPENSES.

The difference in operating expenses as claimed by appellant and as allowed by appellee is $104,198.00.

The items comprising this difference are set forth at page 7, supra. Of the total difference, $71,547.00 results from the finding of the appellee that 39 cents per M c. f. is an adequate gate price for gas purchased by the appellant in lieu of the 45 cents per M c. f. claimed by appellant under the contract with its affiliate, The Ohio Fuel Gas Company.

$30,200.00 results from the reduction in the annual allowance for depreciation made by appellee under the amount claimed by the appellant. These two items total $101,747.00, or all but $2451.00 of the difference in the amount claimed by the appellant and the amount allowed by appellee for operating expenses.

The appellee also reduced the general administrative expenses claimed by the appellant to $5963.00 and increased certain tax allowances by approximately $7750.00. The appellant apparently does not complain as to the reduction in general administrative expenses which was occasioned by a reduction made by appellee in the service fee paid to The Columbia Engineering and Management Corporation, another wholly owned subsidiary in the Columbia system. Appellant paid $13,731.00 to The Columbia Engineering and Management Corporation in 1929 and the appellee allowed $7778.00. This reduction rests entirely on the evidence and the record made in the Columbus Gas case, the appellee having found that 56.6 of the management fees was justified on the basis of the value received.

As has been indicated, appellant does not urge this matter in its brief and we make only this passing reference to it.

Appellant opens its discussion of operating expenses at page 53 of its brief (Appellant's Brief, page 53), and in the closing paragraph on this page states that the appellee and the court below took no notice of an increase in excise taxes of 1% in the state of Ohio enacted by the Ohio Legislature in 1932, and which they contend would

result in an increase in their taxes of $7416.22. This contention raised by the appellant, is, of course, erroneous. The appellee found that the appellant had earned a return of 6½% as of 1929 and that this return was a fair return on its investment, but the appellee made no such finding for 1932. Appellee made every tax allowance credit according to law for 1929 and there is nothing in the record of this case to show the revenues and expenses of this appellant for the succeeding years allocated to this area. It would be absurd, therefore, to give effect in a 1929 rate study to a 1932 enactment of the Legislature.

In determining the excise tax, the appellee took 1.35% of $678,778.00, being the amount it found necessary for a 6½% return to the appellant, whereas the appellant's excise tax was calculated on $679,444.00. The difference in this regard is $9.00. In estimating the Public Utilities Commission tax assessed under Section 606 (Appendix) of the General Code of Ohio, the appellee used the 1929 percentage, whereas the appellant used the 1928 percentage. This percentage varies from time to time because of the method in which the tax is assessed. The difference of $56.00 in favor of the appellant is negligible.

As to federal income tax, the appellant, in its set-up showed a greater operating expense than its operating revenues. This was due, of course, to the three items, gas purchased for resale at 45 cents per M c. f., annual depreciation allowance, and service fees to the Columbia Engineering and Management Corporation. The appellee, in adjusting these expenses, showed an operating

profit, necessitating the allowance of $7697.00 for federal income tax, which amount was allowed as a further operating expense.

With further reference to the increase in the excise tax, which became effective in 1932, and which has been heretofore discussed, the appellant claims that under its present rates now being collected under bond, it would have to pay to the state out of its receipts for 1932, the amount of $7416.00 because of this extra tax and that under the old rates, this amount would be $6794.00. Without questioning the amounts it is obvious that they can only be related to the 1932 revenues and expenses of the appellant which are not in this record. Whether or not this additional tax would deprive the appellant of a fair rate of return, would depend entirely upon what that is determined to be.

The real differences between appellant and appellee, however, in so far as operating expenses are concerned, are confined to the items of (1) annual depreciation and (2) cost of gas purchased, which aggregate $101,747.00 of the $104,198.00 difference in the amounts claimed by the appellant and the amounts allowed by appellee for such expenses.

1. The Annual Depreciation Allowed by Appellee Is Ample and Sufficient and Represents the Actual Percentage Used by the Appellant for This Item.

The appellant contends (Appellant's Brief, p. 54) that the judgment of the court below in affirming the order of the appellee fixing the annual depreciation allowed appellant takes its property without due process of law contrary to the Fourteenth Amendment.

To support this contention, appellant recites that "the proof showed $43,981.00 as necessary for appellant's annual depreciation requirements for its property in the towns." The "proof" upon which it relies is found in an exhibit introduced by the appellant (Exhibit 8, R., 581). Presumably, this evidence which appellant refers to as being "uncontradicted" is supposed to represent 4% of the total depreciable property. As a matter of fact, this was simply another attempt to show a higher operating cost than the appellant actually sustained. Page sixteen of Exhibit 8 (R., 581) contains a summary of actual operating revenues and expenses of the appellant allocated to the territory involved. This cannot be said of the item for depreciation however. That represents a purely theoretical figure and is not taken from the books of the appellant. It should be remembered that the appellee in determining this case has not questioned the allocations made by the appellant either of plant or operating expenses, but has accepted them exactly as presented. Appellant did not, however, choose

to submit its actual book entries showing the amount actually set over to the depreciation reserve account allocated to this territory, but relied on the representations of Ford, Bacon and Davis that an amount equal to 4% of total depreciable property new should be set over into the depreciation reserve account.

The actual practice of this appellant, as shown by its annual reports filed with the appellee each year as required by law is to set up for their depreciation reserve account 2% of the property value (book) of their gas division. The fairness of such an allowance is fully sustained by the record in the Columbus case. The purpose of a depreciation reserve account is to enable the appellant to make itself whole when it retires certain old plant from time to time. It is just as much an accounting problem as it is an engineering problem and the Interstate Commerce Commission has taken full cognizance of that fact in its latest order relating to depreciation allowances for telephone companies (Interstate Commerce Commission Order No. 14,700). For the appellant to set up its experienced operating costs in every particular excepting depreciation reserve allowance, and then resort to a hypothetical percentage furnished by Ford, Bacon and Davis, twice as large as it is actually using, would seem to be entirely unwarranted. The allowance made by the appellee in the sum of $13,721.00 representing 2% of the total depreciable plant of the appellant allocated to this territory is ample and sufficient and should be sustained, particularly as it represents the percentage used by the appellant.

Appellant's discussion of this subject is meager, (Appellant's Brief, pp. 54, 55.) It recites that Section 614-23 of the General Code of Ohio provides that the rates of a utility shall be sufficient "to the necessity of making reservation out of the income for surplus, depreciation and contingencies, and all such other matters as may be proper." It is difficult, however, to determine just how the provisions of this statute assist appellant in this instance. Of course, reservations should be made for annual depreciation, but the question here presented is concerned with the amount of such allowance. The appellant claims 4% of its depreciable plant. The appellee allowed 2%. *The 2% represents the actual percentage used by the appellant under which percentage for annual depreciation it has been able to maintain, in its own language, "a well established utility, furnishing a necessary service, * * * operated upon a high efficiency basis,"* (Appellant's Brief, p. 41) and the recital of what some other commissions have allowed for this item is of little value in the face of appellant's actual practice and actual experience.

2. Cost of Gas Purchased.

Appellant initiates its discussion of this subject with the following statement: "Appellee and the court below erred in disregarding the contracts between appellant and The Ohio Fuel Gas Company and in allowing appellant to include in its operating expenses only 39 cents per thousand for said gas instead of the contract price of 45 cents." (Appellant's Brief, p. 55.)

Further on the same page appellant states: "Appellee's order was based on two theories, (1) because the parties were affiliated corporations the contracts should be disregarded and (2) such contracts being disregarded, the only way to prove the reasonableness of the city gate price was to prove the cost of gas to the Ohio company." (Appellant's Brief, p. 55.)

Certainly the appellant is not quarreling with these theories, for it must be familiar (though it fails to cite the case) with the decision of this court in *Western Distributing Company v. Public Service Commission of the State of Kansas, et al.*, 285 U. S., 119, 76 L. Ed., 655, 52 S. Ct., 283, wherein this court held in paragraph 4 of the syllabus as follows:

> "A state public utilities commission may properly require a natural gas distributing company seeking an increase of rates to show the fairness and reasonableness of the rate paid by it to the pipe line company from which it obtains its supply, where both companies are subsidiaries of a third, although this may involve a presentation of evidence as to the property and business of the pipe line company which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition."

As a matter of fact, the foregoing decision of this court, rendered on the twenty-ninth day of February, 1932, is almost identical, in so far as its facts are concerned, with this case, for in that case, in paragraph 1 of the syllabus it was held that:

> "A local natural gas distributing company making application to a state public utilities commission

for an increase of rates is bound to show that the price paid for gas obtained from a pipe line company is fair and reasonable, although the interstate character of the pipe line company precludes state regulation of its rates, where both companies are subsidiaries of a third company."

Applying the reasoning of the foregoing statement of this court to this case, we find that here is an application by appellant, a local distributing company of natural gas, for an increase in rates; that it purchases its gas from a pipe line company and that both it and the pipe line company are subsidiaries of a third company.

Continuing its argument, appellant (Appellant's Brief, p. 56) claims "that the price specified in said contracts is fair and reasonable being the going market price of gas in like quantities and under like conditions, and the best price that could have been obtained by appellant from any source." Again appellant appears to be in entire ignorance of this court's decision in *Western Distributing Company v. Public Service Commission of the State of Kansas,* supra, wherein in paragraphs 2 and 3 of the syllabus, this court held as follows:

"2. A prima facie case for the fairness and reasonableness of the rate charged for natural gas by a pipe line company to a distributing company is not made by showing that courts have held a like charge to other distributing companies in the state to be reasonable.

"3. A prima facie case for the fairness and reasonableness of the rate charged for natural gas by a pipe line company to a distributing company is not established by uncontroverted averments in a

> complaint in a suit by the distributor to enjoin further enforcement of a public utilities commission rate order and interference by the commission with the charging of reasonable rates, that such wholesaler is its only source of supply, that no supply at a lower price can be obtained from any other source, that the same rate is being charged by the wholesaler to other distributing companies, and by another independent wholesaler to another city, and that an ineffectual effort has been made to develop a local supply of gas and to obtain a lower rate from the wholesaler, where the distributor and wholesaler are both subsidiaries of the same company."

The appellant seems likewise to be uninformed of the decision of this court in the case of *Smith v. Illinois Bell Telephone Company*, 282 U. S., 133, 75 L. Ed., 255, 51 S. Ct., 65, by virtue of which there can be no question about not only the propriety but the duty of this appellee to ascertain a fair city gate price in the instant case.

Appellant attempts (Appellant's Brief, p. 56) to distinguish this case from other cases in which a similar question has arisen in the following particulars and alleges that:

> "1. There are no common officers and only one common director of The Ohio company and appellant."

This may be correct, but appellant does not deny that both the Ohio company and appellant are wholly owned, so far as their common stock is concerned, by the parent company, The Columbia Gas and Electric Corporation, (R., 222) and the language of the Supreme Court of Ohio, in the opening paragraph of its opinion in the

Columbus case *(The Columbus Gas and Fuel Company v. The Public Utilities Commission of Ohio and the City of Columbus,* 127 O. S., 109, R., 82) wherein the court said: "The outstanding fact which must first be stated as underlying and conditioning every element involved in this controversy is as stated in the 1931 annual report of The Columbia Gas and Electric Corporation that all the properties involved in this case are 'thoroughly integrated and interconnected, they constitute a single operating unit,'" is equally applicable in the instant case.

And that

> "2. The appellee in its finding of November 21, 1930, expressly held 'we do not hold the contract between the producing and distributing company void or a sham or fraudulent.'" (R., 134.) The appellant, in all fairness might have concluded this sentence, the conclusion being as follows: "But we take the position that at this time it is incumbent upon the company to produce all available evidence within its control touching the fairness of the gateway rate."

The attempt of appellant to establish as a principle of law the fact that appellee was not entitled to inquire as to the reasonableness of the gate price for gas charged the appellant by its affiliated company, The Ohio Fuel Gas Company, and that the appellee was not entitled to go back of the contract to determine the reasonableness thereof, is so obviously erroneous as to merit but little consideration.

To sustain its contention, it cites but one decision of

this court (*United Fuel Gas Company v. Railroad Commission of Kentucky*, 278 U. S., 300), which, as a matter of fact, does not sustain its position and it neglects to cite the much more recent decisions of this court in *Western Distributing Company v. Public Service Commission of the State of Kansas*, supra, and *Smith v. Illinois Bell Telephone Company*, supra, both of which decisions absolutely refute its contentions.

Appellant (Appellant's Brief, p. 259) insist that it has established the fairness of its 45 cent gate price by "uncontradicted testimony." Unfortunately, we are again unable to agree with the appellant in this contention. We have repeated so often that it has become wearisome, the statement that there was ample evidence in the record of the Columbus Gas case which was incorporated into this case by stipulation, to establish that 45 cents per M c. f. was an excessive price at the city gate, and that 39 cents per M c. f. as allowed by the appellee was more than ample.

In this connection, it should be remembered that the appellee by a majority opinion, found 39 cents per M c. f. to be a proper gate price in the Columbus case (Columbus Gas Case No. 5935, R., 167), and adopted it as a uniform gate price for the Ohio company. The whole matter is covered so thoroughly in the briefs filed in behalf of the city of Columbus in this case (The Columbus Gas and Fuel Company v. The Public Utilities Commission of Ohio and the City of Columbus, October Term, 1933, No. 608, now pending in this court), that it is not necessary to discuss it at length here.

The minority opinion of the appellee in the Columbus case, supra, found 31.7 cents per M c. f. as a proper price. (R., 204.) The appellant contends that it should be not less than 45 cents per M c. f.

The appellee did not in any way seek to impair the contract between the appellant and The Ohio Fuel Gas Company, but it did seek to ascertain the fair gate price in order that it might determine the fair operating expenses of the appellant. It is obvious, therefore, that if 39 cents per M c. f. be found to be a fair city gate price, the appellee's allowance in this case for the cost of gas purchased must be affirmed. And in view of the fact that the Supreme Court of Ohio in The Columbus Gas and Fuel Company case found that a gate price of 31.7 cents or even lower would be fair, we believe that it is fairly conclusive that an allowance of 39 cents per M c. f. would not result in confiscation of appellant's property.

The Relationship Between This Case and the Columbus Gas Case (Columbus Gas & Fuel Company, Appellant v. Public Utilities Commission of Ohio, and the City of Columbus, Ohio, October Term, 1933, No. 608) in So Far as the Cost of Gas Purchased Is Concerned.

In the effort to justify its 45¢ per M c. f. contract price for gas at the city gates the appellant devotes a very considerable portion of its argument (Appellant's Brief, pp. 61-119, inclusive) to that portion of the case relating to the determination of the costs entering into the ascertainment of a fair and just gateway price.

This evidence as to such costs was brought into this case by stipulating that portion of the record in the Columbus Gas case (now before this court for review—The Columbus Gas & Fuel Company v. The Public Utilities Commission of Ohio and the City of Columbus, Ohio, October Term, 1933, No. 608) applicable thereto so that the determination of a proper gateway price for gas in this case turns upon the same evidence that is before this court in the Columbus Gas case. (The Columbus Gas & Fuel Company, Appellant v. The Public Utilities Commission of Ohio, and the City of Columbus, Ohio, October Term, 1933, No. 608.)

The appellee in its decision (both majority and minority) established a system wide gate price for gas sold by The Ohio Fuel Gas Company to its subsidiaries such as appellant in this case and The Columbus Gas & Fuel Company in the Columbus case. (Majority Opinion, R., 164, 176; Minority Opinion, R., 192, 214.) This was the position taken by the appellant (R., 164, 191, 192) who very definitely and positively stated at the very outset of the Columbus case that it would not attempt to make allocations to any particular community. (R., Columbus case, 1778, 1779.) The city of Columbus in the Columbus Gas case insisted upon allocation and the court below sustained the city's position in its decision. (Columbus case, R., 66, 69.) This contention was not urged in this case, however, and inasmuch as the system wide gate price of 39¢ per M c. f. allowed by the appellee was in excess of the allocated price approved by the court in the

Columbus case (not to exceed 31.7¢ per M c. f.) and even on the basis of such an allowance (39¢ per M c. f.) it was found that the appellant's application for increased rates was not justified. In other words, the appellee found a system wide gate price for The Ohio Fuel Gas Company of 39¢ per M c. f. (R., 176; Minority Opinion, 31.7¢, R., 214.) The court below held that the amount allowed by the minority of 31.7¢ per M c. f. was ample. This amount was almost 20% less than that allowed appellant by appellee in this case. Consequently, it is obvious that the amount allowed appellant by appellee in this case for cost of gas purchased at the city gates exceeds the amount allowed by the court below in the Columbus case for this same item allocated to Columbus by approximately 20%. That being so there was no necessity to determine the exact allocation in this case for on the basis of the most liberal allowance that could be made to it appellant had failed to justify its increased rates, and, further, the appellant had insisted that no allocation should be made and that position was accepted by appellee in this case. It follows therefore that if the system-wide gate price allowed by appellee of 39¢ per M c. f. was correct that appellant's case must fail and that if 31.7¢ per M c. f. found by the corut below in the Columbus case is correct then appellant is earning an even greater return than was anticipated by appellee by a very considerable margin for by no stretch of the imagination can it be contended that the gate price of gas at the city gates in this case would exceed the costs of gas at the city gates of Columbus by the difference between 39¢ and 31.7¢ or 7.3¢.

3. Gas Well Construction and Equipment Depreciation —The Ohio Fuel Gas Company.

Under sub-heading 3 at page 61 of its brief (Appellant's Brief, page 61) appellant complains of the fixing of the value of gas well construction (Account No. 211) and gas well equipment (Account No. 212) of Ohio Fuel by deducting from the reprodution cost of said property an amount for depreciation based upon the percentage of decline in rock pressure of existing gas wells.

This matter is so thoroughly treated in the brief filed in behalf of the city of Columbus in the case of The Columbus Gas & Fuel Company v. The Public Utilities Commission of Ohio and the City of Columbus, Ohio, October Term 1933, No. 608, at pages 178 to 187, inclusive, that its discussion of the matter is included here almost in its entirety. This discussion follows:

"No mention of the United is made in this connection because the method employed by the commission, and not disturbed by the court, is the same as that adopted by the commission and court in the United case, the record of which proceeding is a part of the record in this case, and the method is also the same as was employed for construction by the Columbus company's own engineers of their own volition in that litigation.

The Columbus company's engineers, Ford, Bacon and Davis of New York, determined the depreciation of these accounts in this case by partial inspection and observation, while Blundon, city engineer, based his depreciа-

tions upon the gas well's decrease in rock pressure just as was done in the United case.

The most interesting part of the discussion of counsel for the company is their justification for depreciating the well itself, that is, "the hole in the ground," by observation rather than by the depletion of gas, when obviously even the utility experts cannot view that hole.

All of the commissioners accepted the city's depreciations and refused to follow the Columbus company and its experts. The majority opinion merely accepts the city's depreciations, but Commissioner Bricker said this in his opinion:

> "Mr. Blundon's depreciation figure of gas wells was based upon the commonly accepted practice among engineers of determining the per cent. condition from the rock pressure showing at the initial flow and at the time of the appraisal. This is the method used by Ford, Bacon and Davis, the company's appraisers in this case, in the United Fuel case and was the method under which Ford, Bacon and Davis were proceeding in the Ohio Fuel Gas case until, according to the testimony of Mr. Weymouth, he convinced them that a different method should be used, which would bring about a higher per cent. condition and therefore a higher valuation.
>
> Considering that Mr. Weymouth further testified that he favored another method of depreciation, even giving a higher valuation than that given by Ford, Bacon and Davis and the fact that the rock pressure method is an old-established one used in determining depreciation of gas wells and that it has been adopted heretofore by Ford, Bacon and Davis, I accept the rock pressure method as used by Mr. Blundon and apply the same to the valuation of the gas wells fixed by the commission." (R., 202, 203.)

The depreciation of gas wells involves two accounts, the gas well construction account and the gas well equipment account.

The gas well construction account relates to "the hole in the ground," while the gas well equipment account includes the material involved in the equipment of the well, primarily the casing and the tubing.

Lerch, of Ford, Bacon and Davis, was in charge of the depreciation of the Ohio Fuel gas wells, and Antonelli was his field representative.

A glance at the testimony of witnesses for the Columbus Company and the story of Lerch and Antonelli as to why they switched from their own well tried methods afforded abundant proof that the principle applied and the result presented by the appellant in the depreciation of these accounts is the desire of Columbia System officials and not the independent judgment of unfettered appraisal engineers.

On cross-examination Antonelli testified that in depreciating the gas wells in the recent United Fuel Gas Company case in West Virginia, Ford, Bacon and Davis used the gas depletion method for gas well construction, (R., 1500), and that he had assisted in the inventory and appraisement of The East Ohio Gas Company and The Hope Company as of December 31, 1929, involving a natural gas rate for the city of Cleveland, Ohio, where the utilities are Standard Oil companies, and that Ford, Bacon and Davis engineers there also depreciated the gas wells by the depletion method. (R., 1499.) He further testified that he started to depreciate the Ohio Fuel

gas wells by using the very same method that Ford, Bacon and Davis had used in the West Virginia case and were then continuing to use in the East Ohio case, (R., 1501, 1502), that he was getting the initial and final pressure for each active well when the appraisal engineers were "required" by the gas company to desist from the rock pressure decline method. He also said that they were asked by those for whom they were making the appraisal to make only a physical examination of the property. (R., 1497, 1500, 1501.) Concerning the difference in results from the use of the two methods he stated that depreciation on the depletion method in the East Ohio case amounted to about 50 per cent. while the average physical deterioriation found under the so-called inspection method which Ford, Bacon and Davis were here directed to employ produced a depreciation of only 20 per cent. in Accounts 211 and 212. (R., 1504.)

Lerch, who was the chief representative of Ford, Bacon and Davis, in making the Ohio Fuel appraisal, also testified that Antonelli had started to compile the records of the decline in rock pressure of all the existing wells but that he (Lerch) had agreed to the discontinuance of the method. (R., 1531, 1532.)

How far this work proceeded in depreciating Ohio Fuel gas wells is not clear. The city called for the working sheets and persistently tried to ascertain the point to which that work had proceeded. But all our efforts were resisted. The reason is an open book. Lerch said that the condition of gas well construction and equipment found in the United case was 50 per cent. or a little bet-

ter. (R., 1533, 1534.) He admitted that he did not know how to explain the use by Ford, Bacon and Davis of two methods of depreciating gas wells at the same time. (R., 1535, 1536.) He further stated that the depletion method had been developed far enough in the Ohio Fuel case to show that they were going to get a lower valuation than was obtained in the method used. He was then asked this question:

> "Q. Well, I thought that among you representative gas utility men there was nothing more settled in your minds than the theory that you could, with all approximate fairness, determine the life of a well by the history of its rock pressure up to date?"

and his answer was:

> "A. I think you are perfectly right; I do not think anything has happened to change that." (R., 1538, 1539.)

Evidently the engineer, under orders from the Columbia System, had changed his method but had not changed his mind.

Lerch had testified at length in the United case, the record of which is included herein, and, upon cross-examination, was questioned as follows:

> "Q. Mr. Lerch, when you were examined on May 7, 1929, in respect to the depreciation of gas wells, (in the United case in West Virginia) I am advised that these questions and answers were made and given. There may be some slight errors, due to transmission, but let me read them:
>
> 'Q. Now, in that way you got the value of the wells new. How did you ascertain what the present value of the wells was, the depreciated value? A. Well, we have been talking only about the one

account, the gas well construction account. The cost of drilling wells we have assumed in this report the same as in the previous report and the same as we have done in practically all cases of valuing natural gas properties, that the gas well construction account was in the same deteriorated or depleted condition as the remaining rock pressure; in other words, we tabulated the rock pressure of the present wells and averaged the present rock pressure, and compared that with the original rock pressure of these identical wells, and found the wells had a remaining rock pressure of 46 per cent., and we have deducted therefore 54 per cent. of the new value as representing the amount of deterioration in the gas well construction account.'" (R., 1543, 1544.)

He commented that the quotation was substantially correct. (R., 1545.)

Whoever reads Lerch's testimony in the United case will find no occasion thereafter to question Blundon's basic reasoning in respect to the depreciation of gas wells.

It was finally developed, upon cross-examination, that Weymouth, of The Columbia Engineering and Management Corporation, was the Columbia System official who claimed to have "finally convinced" Ford, Bacon and Davis to use the new method. He said he explained his principles of depreciation to them and that they were a little hard to win over but he convinced them. (R., 1630-1633.) And what are Weymouth's principles of depreciation? For his frank confession we need only read his testimony, (R., 1636), where he reveals that he believes property should go into a rate base at cost new without

depreciation. He would hold property and equipment at 100 per cent. condition until it is absolutely abandoned. This is a golden dream of certain utility engineers which commissions and courts still reject.

Now whom shall we believe or follow: Philip drunk? Or Philip sober? Ford, Bacon and Davis using their best judgment in the United case, apparently unrestrained by orders from above, and Ford, Bacon and Davis in the East Ohio case, or Ford, Bacon and Davis starting in Ohio Fuel with their own old methods but, after sitting down across the table with Weymouth, the Columbia System spokesman, being "finally convinced" * * * "that the method used in West Virginia was wrong * * *"? Weymouth used the wrong word. He did not convince them. Antonelli says that he was "directed" to change the method. (R., 1500.)

The physical condition of the tubing and casing in the wells was determined by observation. Of course the observation was not based upon an inspection of the material in the wells, for that was hidden, but upon an inspection of casing and tubing that had been taken from recently abandoned wells. When the average per cent. condition of the recently pulled tubing and casing from other wells had thus been determined, that per cent. was assigned as the condition of both the equipment and the existing wells and also to gas well construction, the hole in the ground. (R., 1497.)

We say in passing that there is no possible connection between the per cent. material condition of the equipment in the well and the worth of the mere hole in the

ground. Surely, whatever method may be used for depreciating the gas well equipment, the hole in the ground loses all value the moment the gas well is abandoned through depletion or otherwise.

A gas well is drilled and equipped for the purpose of producing gas from the underlying sands and obviously is of little use or value when that purpose has been fulfilled or when that purpose has been terminated. The usefulness and the life of a well are measured by the proportion of gas which it has produced and by the proportion it will still produce. The hole in the ground is of no value or profit after it has ceased to produce gas in paying quantities. Indeed it then becomes a liability because of the statutory obligation to plug it.

Blundon applied this same rule of declining rock pressure to the depreciation of the gas well equipment, and as we have already indicated, the commissions of both West Virginia and Ohio adopted and used Blundon's principles in depreciating both accounts. (R., 202, 203.)

The only possible excuse for applying observed depreciation to the gas well equipment, to the casing and tubes, is that there is a salvage value.

Surely the cost of withdrawing the casing and the tubes and the plugging of the gas well would largely eat up any possible second-hand value of the casing and tubes. So, is it not reasonable for us to insist that the gas well equipment should be depreciated in exactly the same way that gas well construction is depreciated, in proportion to the depletion of the gas as determined by the decline in rock pressure? (R., 1511, 1512.)

There are a number of interesting West Virginia cases, in some of which Ford, Bacon and Davis represented the utility. But it is sufficient to refer to one—*Re Clarksburg Light and Heat Co.*, decided in December, 1927, P. U. R., 1928B, 290, pp. 313, 314. Ford, Bacon and Davis had made a report on depreciation and, of course, had been represented in the testimony. We take this from the opinion of the commission:

> "It is evident the engineers have not taken into account the cost of salvaging the equipment and the cost of complying with the West Virginia law requiring abandoned wells to be securely plugged. Moreover, it is impossible to disassociate the cost of labor and the cost of material in determining the value of a structure. Upon its abandonment the cost of labor is entirely lost, except for its salvage value less the cost of salvaging it. No further evidence of salvage value of gas well equipment was adduced, and, it appears that a consistent and fair treatment of this account warrants the application of a percentage of depreciation equal to that for gas well construction. And it is noted that on December 31, 1926, the average rock pressure had continued to decline until a per cent. condition of 34.6 was fixed in Lerch Exhibit No. 7."

Blundon, for the city, based his depreciation, both of the gas well equipment and of the gas well construction, upon the depletion of the gas well itself—upon the proportionate amount of gas that could still be reasonably expected to be withdrawn from the well as reflected by the decline in rock pressure. (City Ex. No. 74, p. 9, Original.) He thus arrived at a depreciation of 58.11 for the two accounts. (R., 1509-1511.) This is the depreciation used by the commission and the court.

In the United Fuel gas case in West Virginia where both Lerch and Blundon testified on the subject of gas well depreciation, Blundon's method of depreciating both gas well construction and gas well equipment on the basis of decline in rock pressure was adopted by the Public Service Commission. (R., 2958.)

We submit that the method presented by Blundon, adopted by the commission and approved by the court, is a proper one and that it would have been employed by Ford, Bacon and Davis as to Account 211 in this case had it not been dominated by orders from the Columbia System. The complaint of the Columbus Company in the matter is without merit."

4. Unoperated Leaseholds—The Ohio Fuel Gas Company.

Under sub-heading 4 at page 66 of its brief (Appellant's Brief, page 66) appellant complains of the finding of appellee affirmed by the court below that only those leaseholds known as Class No. 1, or operated leaseholds, were actually used and useful and excluding from the valuation in operated leaseholds known as Classes 2, 3, and 4.

Counsel for the city of Columbus in their brief in the Columbus Gas case supra (Brief of Appellee, the City of Columbus, in the Columbus Gas case, supra, pages 132 to 147, inclusive) very ably discuss this subject in the following manner:

"The company urges that these leaseholds are owned

and used by Ohio Fuel as the source of supply of natural gas. This contention, as we shall see, is refuted by the company's own evidence which shows that there are no producing wells on No. 2, No. 3 or No. 4 classifications and that they are all unoperated.

Ohio Fuel possesses some rights in certain acreage which are referred to as leaseholds. It owns no part of it in fee and no tax is paid upon it to either county or state but it is held only by leases that give the company the right to enter upon the land and prospect for and remove oil and gas in accordance with specific terms set forth. These leases are made for a term of years and must be renewed at the expiration thereof, unless wells are drilled, in which event they continue as long as gas and/or oil is produced. There are more than 100 different forms of leases but all of them are basically very much the same. The owner of the land is paid a small cash consideration at the time of the execution of the lease and is also paid a rental while his land remains unoperated, but in case of production a fixed percentage is paid as royalty on oil wells and a definite cash sum is paid annually for each gas well. The usual amount paid for a gas well is $200.00. (R., 1080, 1081.) The sums thus paid for operated acreage are an operating expense and were allowed by the commission and the court. (R., 181.)

The Columbus Company presented certain claims for alleged valuations of the leaseholds of Ohio Fuel, (R., 2910, 2911), which were put in evidence through Seyffert.

It produced for cross-examination Dally, Wittmer, Meals and Webber, who made up the said valuation figures. They did not give any direct testimony on the subject. We shall have occasion to discuss their statements rather fully under Operated Leaseholds.

To these leaseholds Ohio Fuel assigned, and the Columbus Company presented, the following classifications and astounding values:

Class 1, Operated,	291,396	acres,	$19,252,029.
Class 2, Unoperated,	164,739	acres,	12,274,635
Class 3, Unoperated,	312,631	acres,	5,281,866
Class 4, Unoperated,	2,065,421	acres,	6,195,947
Total	2,834,187	acres,	$43,004,477.

(R., 2911.)

The definition of these classes are set forth at R. 3124, and are as follows:

"Class 1. Leases of tracts of land having producing gas wells drilled thereon from which gas is being furnished to the public.

Class 2. Leases of tracts of land proved by actual developments and operations in the immediate vicinity thereof to be good gas-producing lands, but which do not have any producing wells drilled thereon.

Class 3. Leases of tracts of land shown by surrounding of neighboring developments of operations, geological considerations, etc., to be reasonably certain to be good gas land, at least as to large portions thereof, but not yet demonstrated to be such by actual drilling.

Class 4. Leases of tracts of land situate within the areas of territory where gas sands are known or assumed to exist from general geological conditions,

but which are so remote from actual gas-producing wells or territory that they are merely prospective gas lands."

In the ordinary course of its business Ohio Fuel carries this acreage on its books as just "operated" and "unoperated," but for the purpose of rate litigation it is divided into Classes 1, 2, 3 and 4 on the basis of the foregoing definitions. As a matter of fact, there are really only two classifications and naturally they are the operated leaseholds, in which active wells are located, and the unoperated or prospective or possible acreage.

When a well that produced gas is drilled the entire leasehold upon which it is located, whether it consists of 10 acres or 1000 acres, becomes known as "operated" acreage. (R., 998, 1027.) Dry holes, or non-productive drilling expense incurred in prospecting for gas, are paid for out of revenues as an operating expense and have been so allowed in this case. (R., 179, 217.)

On this total of 2,834,187 acres of mere leases, to which, with the exception of the "operated," consisting of 291,396 acres, it has only the right to enter, explore for and remove gas if found, Ohio Fuel claimed a value of $43,004,477.00, (R., 2910), which is almost two thirds as much as the value of all its other properties and demanded a return of 8 per cent. thereon. It also demanded the right to charge to operating expenses delay rentals on the 2,542,791 acres that are unoperated in the sum of $1,684,913.00 annually. (R., 2908.) Of course no commission or court could allow such presumtuous claims.

But that is not all. The Columbia System would not only place these entire leaseholds in the rate base at high imaginary values and collect an 8 per cent. return thereon but, while charging the delay rentals to operating expenses, it would also have the consumers pay these values to Ohio Fuel through amortization at 4 per cent. annually over a 25-year period. (R. 2907.) If the company sees fit to fail to renew any of these leases, or to drop any of this acreage for any reason, no adjustment is proposed for the benefit of the consumer; it would have him continue to pay just the same as on the original basis of leaseholds as of the date certain. The utter injustice of this proposal is shown by the fact that although witnesses for the Columbus Company said that all of the unoperated acreage was necessary on December 31, 1929, in 1930 Ohio Fuel abandoned 525,445 acres of this unoperated leased territory. The consumers, it would plainly appear, enjoy a distinct privilege under such a system and that is to be exploited.

There is another matter which should here be remarked althongh we shall discuss it later. There is a private oil producing corporation known as The Preston Oil Company operating in Ohio which, like the Columbus Company, Ohio Fuel and United, is a subsidiary of The Columbia Gas and Electric Corporation. As we shall show, the unoperated acreage claimed for this oil company is the same as that claimed by Ohio Fuel, but Ohio Fuel, the public utility, has always assumed the expense of securing all leaseholds for both companies and also the payment of all delay rentals. The Preston Oil Company

pays no lease rentals; those have always been charged as an operating expense to the utility. In this situation is found a measure of the reason for the gas company desiring to include vast unoperated acreages in its rate base. (R., 1002-1023.)

Class 1, deisgnated "operated," consisting of 291,396 acres, is the only acreage upon which any wells are located and consequently is the only part of the listed leaseholds in Ohio from which consumers are being supplied with gas. Although not fully drilled, it is the property considered as "actually used and useful," (Section 614-46, G. C., Appendix), by the commission and court for the purpose of determining proper rates for the ordinance period in question.

The record shows that while Ohio Fuel allegedly holds 2,542,791 acres of unoperated leaseholds, it is at the same time purchasing about one-third of its gas from United of West Virginia and approximately a little less than another third from independent producers in Ohio and is thus actually obtaining only about one-third of its necessary volume from its own Ohio acreage. (R., 2905, 2906.)

How, in the name of reason, can any company demand, much less expect, to saddle 2,542,791 acres of unused leaseholds and 291,396 acres of partially used leaseholds upon the backs of existing gas consumers while it buys almost two-thirds of its supply of gas elsewhere?

Much of this 2,542,791 acres of unoperated leaseholds, if it has gas under it, will be furnishing a supply for the second and third generations of existing consumers' chil-

dren and others. How can anyone then, except those who have an interest in boosting the price of gas, even profess to believe that existing consumers should be burdened with such a futile load? That is just what the Legislature in Section 614-46, G. C., limiting rate base property to "actually used and useful," meant to and does forestall.

The pertinent part of Section 614-46, G. C., is as follows:

> "If the commission, after such hearing, shall be of the opinion that the rate, price, charge, toll or rental so fixed by ordinance is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service, the commission shall, with due regard to the value of all the property of the public utility, actually used and useful for the convenience of the public, * * * fix and determine the just and reasonable rate, price, charge, toll or rental to be charged, demanded, exacted or collected by such public utility, during the period so fixed by ordinance. * * *." (Appendix.)

The Ohio Legislature, commission and court are in accord that existing consumers must not be burdened with tremendous charges for acreages which are not now, and perhaps never will be, of any use to them.

* * * * * * * * * * * * * * * * * * *

Seyffert, on direct examination, said, assuming that Ohio Fuel could buy gas from independent producers and United in the amount that it was then buying, the amount of gas in the ground would be equivalent to about a 10 year period, and that if Ohio Fuel were not able to buy gas from other sources the present supply would be

equivalent to a 5 or 6 years' supply. Naturally the witness was attempting at that time to minimize the amount of gas to be recovered from Class 1 acreage, but, even actuated by that motive, the best testimony offered was that under present conditions the supply would last for 10 years. (R., 1052, 1053.) The Columbus Company offered no evidence that Ohio Fuel anticipated any change in its source of supplies and there exists no basis for assuming that there will be an alteration of existing conditions. The testimony of Dally and Wittmer estimates a much greater existing supply than that given by Seyffert. (R., 1098, 1164.) Wittmer and others said the probable recovery from Class 1 acreage yet obtainable will reasonably average 4,000,000 cubic feet per acre. (R., 1164.) This would make a total reserve in the operated acreage of 1,165,584,000 M c. f. Enough gas to last Ohio Fuel for more than 20 years on the basis of its present total annual sales buying none from independent producer or from United.

. . . . . .

The evidence discloses that several witnesses say there is a large reserve in the Class 1, or operated, leaseholds. This is, of course, in addition to the life which remains in the presently existing wells. Dally, for the company, testified as follows:

> "Commissioner Geiger: How long has acreage No. 1 been drawn from, for what period of time, on the average?
>
> The Witness: I don't know what the average is but some of it has been drawn for a number of years.

Commissioner Geiger: I know that, but—

The Witness: A good deal of it lately—later years; not so far back.

Commissioner Geiger: Well, are you prepared to say that in your judgment 90 per cent. of the original gas content of acreage No. 1 still remains in the ground?

The Witness: Approximately that amount." (R., 1136.)

He also said that he estimated 4,000,000 cubic feet of gas per acre still remaining in the operated leaseholds. (R., 1098.)

Meals also testified that there was much drilling yet to be done on Class 1 acreage and he had no doubt but what large volumes of gas would still be found on it. (R., 1215.)

The record very definitely shows that the operated acreage is not fully drilled and, in the opinion of gas men, contains a large reserve within itself in addition to the gas yet to be drawn from existing wells. The commission and court had every right to conclude from the evidence that untold quantities of gas may yet be obtained from Class 1 acreage.

In light of the facts and the real situation it does the Columbus Company no credit to pretend that the reversed finding of the majority commission that Class 1 acreage would be exhausted 3 years and 2 months after December 31, 1929, is correct. It made no such claims or pretensions for Ohio Fuel during the trial of the case. In fact, if its counsel really believed exhaustion of the

operated acreage so imminent and immediate, how can they ever justify the purported market value of $19,252,029.00 (R., 2911), for which they then contended? This conflicting and irreconciliable position of the appellant was fully presented to the lower court.

The Columbus Company pretends to believe Class 2 acreage used and useful because it is being drained seriously by wells located on Class 1, but this is a highly speculative matter about which no one can be certain. One company witness even minimized the claim. Dally, for example, testified that he assumed that acreage No. 2 had not been touched, as far as drawing gas from under it is concerned, except where wells in Class 1 might be very close to Class 2, but that Class 2 is not seriously affected. (R., 1136, 1137.) Others of the company's witnesses testified that no one could tell where gas exists or how the pools or pockets may extend except with the point of the drill. (R., 1567.)

The commission, majority and minority, found that Classes 2, 3 and 4 are not actually used and useful and excluded them from the rate base. The majority do so in this language:

> "In the case of the *Logan Gas Company v. The Public Utilities Commission of Ohio*, 124 O. S., 248, what is now known as the operated acreage was there designated 'class number 1,' while the unoperated acreage was designated as 'classes number 2, 3 and 4,' depending on the relative likelihood of each such class becoming producing acreage. In the case in question it was held by the Supreme Court in a somewhat divided opinion that neither class number 2, 3 or 4 should be considered in fixing the valuation

of the property that was then used and useful. The Commission has determined that the acreage at present used and useful by The Ohio Fuel Gas Company in produing gas, a part of which reaches the Columbus gateway, is 291,396 acres."

Under similar facts with the same classification of leaseholds employed in this case, the Supreme Court of Ohio had held in *Logan Gas Company v. Public Utilities Commission of Ohio*, 121 O. S., 507, at pages 509 and 510, 169 N. E., 575:

"As to class No. 2, to wit, leases of tracts of land proved by actual developments and operations in the immediate vicinity thereof to be good gas-producing lands, but which do not have any producing wells drilled thereon, the majority of the court are of opinion that, while the leases upon territory of such character may in the future be 'useful,' the same do not come within the purview of the statute, which requires the property to be given valuation to be both 'used and useful.' The leaseholds covering such character of territory, not being both 'used and useful,' the commission's views upon that point are affirmed. The judges concurring in this view are Marshall, C. J., Kinkade, Robinson, Matthias and Allen, JJ.

As to classes 3 and 4 all judges concur that the Commission was right in not allowing valuation therefor as property 'used and useful.'"

In the case at bar the court, citing the Logan Gas case, supra, with approval, again sustained the decision of the commission excluding Classes 2, 3 and 4 leaseholds (non-producing) from the valuation upon the ground that the property was not actually and useful. *Columbus Gas &*

Fuel Co. and City of Columbus v. Public Utilities Com., 127 O. S., 109, 187 N. E., 7. (R., 50, 62, 63.)

The case of *United Fuel Gas Company v. Public Service Commission of West Virginia*, 14 Fed (2d), 209, was on a bill in equity before a three-judge court to enjoin the commission from enforcing its order with reference to rates for gas, on the ground that by the orders of the commission complainants property was being taken from it without due process of law. The court made detailed findings and denied the application for an interlocutory injunction. One of the main issues was the value of the gas leases. The gas company controlled the production of natural gas from 814,910 acres of land.

The lower court included in the rate base the assessed value of only 136,384 acres (proven), which were then being used in production, and excluded on the ground that they were not presently used and useful in the public service, 126,208 acres described as probable, and 552,319 acres classed as improbable or unfavorable, valued by the gas company at $26,000,000.00. The statutory court said:

> "Among the questions raised by the claim of the plaintiff, that the value of the gas under the various classes of acreage shall be treated as a part of the value upon which it is entitled to a return are: First, What is the amount of gas under each class? Second, What is its present value? Third, How much of that value is presently used in the public service?
>
> . . . . . .
>
> "Its right to relief is nevertheless absolutely dependent upon its being able to maintain the position that it is entitled to a fair return upon the present value of such of its property as is used and useful

in the public servie. Whether it showed good judgment in acquiring and holding any other property is irrelevant to any issue upon which it here seeks a decree. No part of the gas which is supposed to be under the acreage classed as either probable or possible is 'used' in the public service or for that matter in any other, in any ordinary sense of that word.

"It will be noted that the total of the gas underlying the proven acreage was 249,100,100 M c. f. As the plaintiff sells annually about 47,000,000 M c. f. of which 10,500,000 goes to the West Virginia retail purchasers, it has under its proven territory gas enough for everybody for more than five years, and an amount sufficient to meet the needs of its public service patrons alone for almost a quarter of a century.

"For the reasons already stated, we cannot see how any other portion of its gas can be held to be used in the public service, no matter how elastic a definition be given to the word 'used.' At the risk of tiresome repetition, we can say that we do not criticize the plaintiff for acquiring any or all its gas rights. It was doubtless wise to get them. All that we decide is that, in arriving at the rate base upon which plaintiff is entitled to a fair return, we may not combine two opposing theories. We are not justified in saying that, because plaintiff's investments in gas reserves were prudent, those reserves immediately went into use, and that, therefore, plaintiff is entitled to have them appraised at the many times higher value it says they now have. If, in dealing with its tangible property, and going concern value, we are required to ignore, except for check purposes, plaintiff's investment in them, we must apply the same rule to its gas reserves."

It will thus be seen that the court decided squarely that only the developed acreage should be included in the rate

base, and excluded from the rate base 80 per cent. of the company's acreage, valued by it at $36,131,865.00.

The decision of the three-judge court, denying an interlocutory injunction, was affirmed by this court, *United Gas and Fuel Company v. Public Service Commission of West Virginia*, 278 U. S., p. 322, 73 Law. Ed., 402, 49 S. Ct., 157.

Ohio Fuel has acquired much of its unoperated acreage over and above its requirements for the two-fold purpose of preventing competition and increasing the value upon which rates may be based. If it is able to obtain control of what shows promise of becoming gas acreage it, of course, is able to prevent other companies from coming in and making use of it for the purpose of competition. Quite naturally, if while keeping out competitors it can boost its rate base and compel consumers to carry the load it is in a very formidable position. The company would use unreasonable rates to its customers, based upon alleged value and carrying charges for unused acreage, with which to prevent competition when that very competition would doubtless assure lower rates to gas users. This may be good business judgment on the part of the company, but certainly consumers should not be required to carry such a burden.

The claims of the Columbus Company in this case in behalf of Ohio Fuel demonstrates conclusively the necessity for commissions and courts drawing a definite line of demarcation between leaseholds that may be included in a rate base and those that may not be included. Commission regulation will be circumvented, thwarted and

eventually destroyed by ambitious and grasping gas companies unless some definite rule of inclusion prevails. The law is clear, the dividing line in Ohio lies between the acreage which is "actually used and useful" and that which cannot be so regarded. This rule has always been applied in Ohio by both commissions and courts.

This doctrine has been applied generally. In *Los Angeles Gas and Electric Corporation v. Railroad Commission*, 289 U. S., 287, 305, it was said by this court:

> "This court has repeatedly held that the basis of calculation is the fair value of the property, that is, that what the complainant is entitled to demand, in order that it may have 'just compensation,' is 'a fair return upon the reasonable value of the property at *the time it is being used for the public.*'" (Italics ours.)

And the following may be mentioned as typical cases:

San Diego Land & Town Co. v. National City, 174 U. S., 739, 757, 43 L. Ed., 1154, 1161, 19 S. Ct., 804;

Smyth v. Ames, 169 U. S., 466, 547 L. Ed., 819, 849, 18 S. Ct., 418;

Willcox v. Consolidated Gas Co., 212 U. S., 19, 41, 53 L. Ed., 382, 395, 29 S. Ct., 192;

Minnesota Rate Cases (Simpson v. Shepard), 230 U. S., 352, 434, 57 L. Ed., 1511, 1555, 33 S. Ct., 729;

Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Serv. Commission, 262 U. S., 276, 287, 67 L. Ed., 981, 984, 43 S. Ct., 544;

Georgia R. & Power Co. v. Railroad Commission, 262 U. S., 625, 631, 67 L. Ed., 1144, 1147, 43 S. Ct., 680;

Bluefield Waterworks & Improvement Co. v. Pub-

lic Serv. Commission, 262 U. S., 679, 690, 67 L. Ed., 1176, 1181, 43 S. Ct., 675;
McCardle v. Indianapolis Water Co., 272 U. S., 400, 410, 71 L. Ed., 316, 325, 47 S. Ct., 144;
St. Louis & O'F. R. Co. v. United States, 279 U. S., 461, 484, 485, 73 L. Ed., 798, 808, 809, 49 S. Ct., 384.

In conclusion we again invite attention to the inclusion by the commission, with the sanction of the court, of dry hole or "non-produtive well drilling expense" incurred in exploration for gas as an operating expense of Ohio Fuel. In recent years the company claims to have expended amounts as follows for this item:

1927	$495,139.46
1928	557,320.95
1929	618,788.82
1930	635,242.74

City Ex. No. 89, Original.

The figure used in this case is based upon the experience of the company in 1929. (R., 179.)

We further invite attention to the ruling of the commission that when non-productive acreage is brought into production the cost incurred in carrying it through its non-productive period may well go into valuation and be capitalized. (R., 156.)

The commission and court in this case, under the facts and the law, very properly eliminated Classes 2, 3 and 4 from consideration."

5. Operated Leaseholds—The Ohio Fuel Gas Company.

Under sub-headings 5, 6, 7, 8 and 9, appellant, in its brief (Appellant's Brief, pages 72 to 108, inclusive) complains of the method used by appellee and the court below in its valuation of what are known as Class No. 1 or operated leaseholds.

The city of Columbus in its brief (brief of appellee, the city of Columbus, in the Columbus Gas case, supra, pages 149 to 168, inclusive), discusses this subject at considerable length. That portion of its discussion which is pertinent to this case follows:

"The operated leaseholds of Ohio Fuel on December 31, 1929, consisted of 291,396 acres. A lease constitutes a unit for development; if one producing gas well is discovered on leased premises, regardless of its size, the entire acreage is classified as operated. (R., 1148, 1150.) The fact that it may be still further developed does not change the classification.

The valuation set forth in the record for this acreage does not include gas well construction or equipment which are separately evaluated and included. (R., 180, 217.)

The royalties paid on Class No. 1, or operated leaseholds, amounting to $538,206.00 annually, are recognized as an operating charge and allowed as part of production expense. (R., 181, 218.)

The leasehold claims were introduced through Seyffert. The values were assigned by Dally, Wittmer, Meals and

Webber, and although they did not give any direct testimony on the subject they were produced for cross examination. These are the alleged market values the witnesses gave to this Class 1, or operated acreage:

		Value per Acre.
A. B. Dally.....	$26,225,640	$90.00
Geo. Wittmer, Jr.....	21,825,000	74.79
S. W. Meals.....	17,483,760	60.00
D. S. Webber & Son.....	11,473,717	39.37
Average	$19,252,029	$66.07

(R., 2911.)

There are good and sufficient reasons for the commission and court rejecting both the company's exhibits and the testimony of their witnesses in respect to these leaseholds and their claimed valuation.

Not one of these men can be said to be disinterested, since all of them are engaged in the natural gas business and it is to the advantage of each of them to boost the value for leasehold acreage as high as possible.

Dally is associated with the Benedum Trees Oil Company, which has recently become connected with the Columbia System. He is an official in a number of natural gas companies and is president of the Penn Oil Gas Company, which is a producing company with approximately 60,000 acres of leaseholds in Ohio, selling gas to the Ohio Fuel. He has been often used as a witness on leaseholds, having appeared in the Iroquois Gas Company case in New York, the United Fuel case in West Virginia and the Logan case in Ohio. (R., 346-350.)

Wittmer is an officer in a number of gas companies and is a director and treasurer of the Wittmer companies. These companies possess about 100,000 acres of leaseholds in Ohio. They sell gas to utilities and Ohio Fuel is among their customers. He has also often appeared as a witness, testifying for the Philadelphia company, the People's Natural Gas Company of Pittsburgh and the Iroquois Gas Company of Buffalo. (R., 351-354.)

Meals is president of the Carnegie Natural Gas Company and had a personal interest in leaseholds in Ohio in 1929 and 1930 and still held such interests when he testified. He has been widely used in gas litigation, having appeared for the Philadelphia company, the People's Natural Gas Company, the Iroquois Gas Company and the Logan Gas Company. (R., 355-358.)

Webber was for 15 years an employee of the Ohio Fuel and at this time is a stockholder of the Columbia. He is also personally interested now in a number of leaseholds in Ohio. He too has become rather professional as a gas witness, appearing in the Logan, Dayton Light and Power, Iroquois and the East Ohio cases. (R., 359-360.)

The position of these men is well expressed in the following opinion:

> "These business witnesses are all highly competent men. Every one of them is, however, interested in natural gas companies. Perhaps it would not be unnatural to suspect that they are inclined to think well of properties similar to that of which they are part owners. It is scarcely possible that their judg-

ment remains altogether uninfluenced by the fact that the judicial decision of some of the questions raised in this case may be of great importance to their own companies."

United Fuel Gas Company v. Public Service Commission, 14 Federal (2nd), 209.

The attention of the court is invited to the great difference in value assigned by these men. Between the lowest guess and the highest guess there exists a spread of almost $15,000,000.00, and bear in mind that this is on only the 291,396 acres. Between the lowest and the next highest there is a chasm of more than $6,000,000.00 and between the lowest and the third highest there is a divergence of more than $10,000,000.00. This proves in a convincing manner the non-existence of a leasehold market. If there were anything like an exchange market the value of these leases could be given by disinterested men acquainted with such matters so that only reasonable differences would separate their estimates. It would not be a matter of mere guess and hazard but something upon which well-informed men could not possibly disagree so widely.

Now and then there are in Ohio a few isolated transactions in which comparatively small tracts of gas leaseholds are bought and sold, but there has been no such open dealing in these properties as is necessary to establish anything like defined or trustworthy market values.

A studied effort was made by these leasehold witnesses to escape the fatal features of so-called market value testimony which has been found prevalent in such mat-

ters in every well considered decision of courts and commissions, but nevertheless they could not conceal the fact that their estimates of purported market value of the leaseholds was bottomed upon some guess or assumption as to the quantity of recoverable gas under the leases and the possible value of that gas at some assumed price in some existing regulated or imaginary unregulated market. The evidence is indeed so speculative and vague that it is unreliable in fact and incompetent in law.

There exists a very important encumbrance upon these leaseholds arising out of the public utility obligation resting upon them, but the witnesses, in placing a so-called market value upon them, gave it no consideration. On this point in *The City of Charleston v. Public Service Commission*, 110 W. Va., 245, P. U. R., 1931E, 74, the West Virginia Court of Appeals said at pages 81-82 (P. U. R. citation):

> "That value was placed on the leaseholds by witnesses who had in mind chiefly an unregulated use of the gas. However, the leaseholds are subject to the requirements of the public. This subjection constitutes a 'genuine encumbrance' (Dr. Gray, economist) which conceivably might impede the sale of the leaseholds on the open market. See opinion of Mr. Justice Stone in United Fuel Gas Co. v. Kentucky R. Commission, 278 U. S., 300, 317, 73 L. Ed., 390, P. U. R., 1929A, 433, 49 Sup. Ct. Rep., 150. The witnesses did not take into consideration the far reaching effect of this incumbrance, but for rate-making purposes the incumbrance must be considered."

This situation alone, to make no mention of intercorporate connections, clearly indicates that the alleged offer of Benedum-Trees Oil Company to Ohio Fuel was a mere sham and the commission committed no error in refusing to permit it to become a part of the record because it held no evidentiary value.

It is, of course, important to understand how the witnesses arrived at their final figures of value.

Upon cross examination Dally testified as follows:

> "Q. Mr. Dally, what were the controlling factors considered by you in arriving at the value of this leasehold acreage? A. Starting with the acreage which had been drilled, I considered the wells in their production, the rock pressure, the amounts of gas that they had produced or were producing, against the conditions named in the record here; their location on the territory. That was the general conditions." (R., 1093.)
>
> "Q. And what would govern them after getting the substantial gas content? What would then govern, what you could get for it in the market? A. Well, of course the test of that is the rate or price you get for the gas and that rate or price is minus all the things that it takes to operate a gas company, including the dry holes that I mentioned this morning and the hazards, all has to go in against that whatever the charges are. Then you arrive at what you can afford to sell that gas per thousand at in the market." (R., 1094.)

Further cross examination showed that Dally figured the valuation he assigned to the leaseholds by considering the possible gas content of the acreage and an estimated rate for gas as a competitive fuel in a fancied unregulated market. (R., 1128, 1129.) In this the wit-

ness unwittingly ran afoul of one of the weaknesses of the United Fuel Gas case. His answers conclusively prove an inadmissible assumption within the rule laid down by Mr. Justice Stone when he said:

> "It is true that a part of appellants' business is not regulated at present, but it does not appear that the ultimate distribution of their product to consumers in other states will be immune from regulation either because of the interstate commerce clause, Pennsylvania Gas Co. v. Public Service Commission, 252 U. S., 23; Public Utilities Commission v. Landon, 249 U. S., 236, or for other reasons, and there can be no reasonable assumption that it will be. The unique character of appellants' control over a natural product, limited in amount, asserted here as a basis of value, the obvious necessity of securing franchises or special privileges to enable them to distribute their product to consumers under the conditions assumed, and other circumstances which subject them to regulation in Kentucky and West Virginia, make inadmissable the assumption that the price to consumers would remain unregulated elsewhere."
>
> *United Fuel Gas Co., et al. v. Railroad Commission of Kentucky*, 278 U. S., 300, at p. 417, 73 L. Ed., 390, 49 S. Ct., 150.

Such testimony possesses no probative value.

Later in his testimony Dally said he considered Class No. 1 still 90 per cent. good, (R., 1136), and, allowing for the gas that had been taken out of this operated acreage, he had estimated a remaining 4,000,000 cubic feet per acre. (R., 1098.) Having thus estimated the probable gas content of the territory and considered the price for which he could sell the gas, Dally arrived at this figure for the value of the property. (R., 1098-1101.)

In the cross examination of Wittmer it developed that he too had taken into consideration the probable amount of gas in the acreage in order to determine the value. (R., 1158.) He said the recovery, in his opinion, would vary from 2,000,000 to 10,000,000 cubic feet per acre with an average of 4,000,000 cubic feet per acre, (R., 1164), and the value given the leaseholds was calculated upon the highest price he could hope to obtain for the gas in an unregulated market. (R., 1171-1172.) There is virtually no unregulated market in Ohio, because when a company supplies natural gas to more than one consumer, domestic or industrial, it is a public utility subject to regulation. G. C., 614-2, 614-2a, 614-3, appendix. The vague market to which he referred was never named. The Wittmer companies, of which he is treasurer, sell their gas to Ohio Fuel and other utilities at 18 cents per M c. f. and Wittmer himself admitted that it was a fair price and that these companies were getting along all right. (R., 1204, 1205.)

The witness Meals said that he arrived at his figure of value in almost the same way. (R., 1221, 1222.) He was sure he could sell the gas from this acreage in some markets for more than 15 cents or 18 cents per M c. f. but added, "I don't know where." (R., 1223.) And yet, when he attempts to place a market value on leaseholds for rate purposes he employs a 20 to 25 cent rate per M c. f. at the well and a higher rate to be obtained in some mythical unregulated market. (R., 1224.) The premise upon which such a market value is figured is conjectural and speculative, to say the least.

Webber, too, took into consideration the probable gas content of the acreage and the price that he could get for it. (R., 1284.) He admitted that Pittsburgh is occupied but named the distant eastern towns of Rochester and Buffalo as possibilities for industrial gas. He further stated that the Iroquois Gas Company was already furnishing service in that field. (R., 1288, 1289.) And still further on he related that he had in mind, if there was a sufficient amount of proven acreage acquired, going to some town and, if possible, securing a franchise to go into that town and supply it with gas. This would certainly presume selling in a regulated market. (R., 1291, 1292.) He also admitted, as did the other witnesses, that he knew of no transactions in Ohio involving leasehold acreage of the extent, quality and character of those of Ohio Fuel. (R., 1289.) Thus the so-called market value of this witness was also speculative, conjectural and indefinite.

Since all of these witnesses estimate the gas content in the ground and the price which may be obtained for the assumed volume in an imaginary market, and upon those bases presume to set a so-called market value for the leaseholds while similar properties similarly situated are not being exchanged, as is shown by the evidence, the method and result do not differ from those found in causes where the testimony has been held wholly incompetent.

We submit that there is no market and that the bases assumed by these company witnesses were wholly speculative and uncertain, but that, even though there were

a market, the value of the lands for rate purposes could not be established by what they would bring in exchange. They are being used in a regulated business where rates cannot be built up by employing a value that depends on earning capacity. Under such a system the value is based on the earning capacity and the earning capacity on the value and the result is a vicious circle. Courts have almost unanimously rejected such methods of valuation.

In the case of *United Fuel Gas Company v. Railroad Commission of Kentucky*, 13 Fed. (2nd), 510, the utility sought to prove the so-called market value both by the testimony of geologists and engineering experts and by the testimony of men experienced and interested in the production and marketing of natural gas who purported to assign to the leaseholds a market value or exchange value or the price which the property would bring if sold by a willing seller to a willing buyer. In the course of his opinion holding that such testimony was incompetent and that the only competent testimony in the record was the book value, Judge Hickenlooper, at page 519, among other things, said:

> "The other witnesses for the complainants arrive at their valuation upon the exchange value basis. Both methods have in contemplation the value of the use, and both consist of capitalizing the earning power of the properties in arriving at their value. The fallacy of this argument, that, because of the earning capacity and large return allowed, the property has greatly increased in value, and that such increased value should thereupon be taken as the basis for another calculation of a still larger return,

would seem quite apparent. The fallacy of valuing the use upon the earning capacity, and then fixing rates upon the value thus determined, has been observed by Mr. Justice Hughes in the Minnesota Rate Cases, 230 U. S., 352, 461, 33 S. Ct., 729, 57 L. Ed., 1511, 48 L. R. A. (N. S.), 1151, Ann. Cas., 1916A, 18, and by Mr. Justice Brandeis in his concurring opinion in the Southwestern Telephone Co. case, supra. See also the following cases, to the effect that earning power, in the sense of good will or franchise value, must be excluded from consideration in arriving at the rate base: Willcox v. Consolidated Gas Co., 212 U. S., 19, 52, 29 S. Ct., 192, 53 L. Ed., 382, 15 Ann. Cas., 1034, 48 L. R. A. (N. S.), 1134; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S., 655, 669, 32 S. Ct., 389, 56 L. Ed., 594; Des Moines Gas Co. v. Des Moines, 238 U. S., 153, 165, 35 S. Ct., 811, 59 L. Ed., 1244; Galveston Electric Co. v. Galveston, 258 U. S., 388, 396, 42 S. Ct., 351, 66 L. Ed., 678; Georgia Railway v. Railroad Commission, 262 U. S., 625, 632, 43 S. Ct., 680, 67 L. Ed., 1144.

"The language of the Supreme Court of Appeals of West Virginia upon this question seems peculiarly apt: 'However, as we interpret those cases, the "present fair value" for rate-making purposes does not mean the market value of the property as determined by the rate of return, or as based upon earnings when the reasonableness of the return or earnings is in question. If it does, then an increase in rates would increase the market value of the property, and that would again call for further increase. This would recur again and again; rates increasing values, and increased values requiring increased rates, would follow each other, to avoid confiscation under the Constitution. This vicious pyramiding would go on and on, until the point would be reached where the public would cease patronizing the utility rather than pay the price. The net result would be that the public would always be compelled to pay

"all the traffic would bear," and governmental regulation of the prices to be charged would be at an end. Its only function in that respect would be to prevent discrimination.' City of Charleston, et al. v. Public Service Commission, et al., 95 W. Va., 91, 120 S. E., 398. Innumerable other authorities are cited by counsel for the municipalities to the same effect, but the situation would appear to be too clear for extended discussion."

The decision of the statutory court on this point was sustained in *United Fuel Gas Co. v. Railroad Commission of Kentucky, supra,* where Mr. Justice Stone in commenting upon both types of proof offered by the utility said at page 316:

"Appellants' second class of expert testimony is that of men experienced and interested in the production and marketing of natural gas, who purported to assign to appellants' gas field what was described on the argument as its present exchange value or the price which the property would bring if sold by a willing seller to a willing buyer. Three such witnesses testified to a present value of appellants' gas field in amounts varying from $30,000,000 to $35,000,000 and a fourth fixed the value at $45,000,000. Examination of their testimony discloses that these estimates were not based on prevailing prices for gas leases or on actual sales but, as in the case of the geological and engineering experts, upon an estimated or assumed exhaustible supply of gas available to appellants until exhausted, and upon a predictable price for natural gas in unregulated markets through a future period of about eighteen years. Common characteristics of both methods of valuation, therefore, are the estimation on uncertain bases of the volume of gas available and of the price at which it may be sold through a long future period."

And it was further held at page 317:

> "Waiving these not inconsiderable difficulties in the way of establishing value, we pass to another and more serious difficulty. In both methods of valuation, the value of property used in a business whose rates are regulated is made to depend on an assumed earning capacity, and the data relied on to establish assumed earning capacity are themselves essentially speculative—so much so as to form no trustworthy basis for the computation of value."

In *The Logan Gas Company, et al. v. Public Utilities Commission of Ohio,* 124 O. S., 248, 249, 177 N. E., 587, the Supreme Court of Ohio, in discussing evidence of this character, said:

> "In hearing the evidence and in arriving at a conclusion as to the market value of the leaseholds in question, the commission was not convinced of the probative value of evidence of market value testified to by the company's experts, because such evidence necessarily was not and could not be based upon the price such property would bring in the open market, with a willing seller and a willing buyer, there being no such market by reason of the system of organization and operation of the Logan Gas Company and other gas companies; that each company in its own field constitutes, in effect a monopoly; that actual value depends upon the company's earning capacity, based upon the price which the company is willing or obliged to pay for the gas in the ground, the cost of production and distribution, and the price the commission will allow it to charge the consumer; that to base market value upon such premises was but in a large measure to base it upon the very rate which the commission was seeking to determine."

The majority commission, in passing upon the competency of the testimony of these witnesses, used the following language:

> "Manifestly the present value depends upon the quantity of gas below the surface, and as gas is withdrawn, the acreage becomes less valuable in proportion that the withdrawn gas bears to the gas still to be captured."
>
> * * * * * * * * * * * * *
>
> "We are at once confronted with the question of the probative value of evidence touching the market value. Such evidence could not be based upon the price between a willing buyer and a willing seller. In the very nature of the operation, companies have a monopoly within their own field, and further the value of the land in the market would depend upon the price which the regulated company may be permitted to charge to its customers. A market price could not be fixed where the value would be dependent upon the rate which could be charged when that rate is within the control of a regulatory body and should depend upon the value of the land. To say that the value of the land is to be determined by the rate at which the gas may be sold, and that the rate for which the gas may be sold depends upon the value of the land is reasoning in a circle, and such testimony can be of but little value." (R., 153.)

The Supreme Court of Ohio affirmed the action of the commission in rejecting the testimony of the witnesses for the company and held that no market value was established. * * *

In order to portray the price per acre which the company was paying for acreage that it was classifying as No. 1 in 1927, 1928 and 1929, Blundon, for the city, made a compilation from the records of the company, as dis-

closed in Company Exhibits 146, 147 and 148 and City Exhibits 71, 72 and 73, which he presented as pages 24 and 25 of City Exhibit 115. (R., 3187, 3188, 3189.) The considerations shown on these pages are conclusive proof of the average price that was paid farm owners during the three years immediately prior to the date certain of this appraisal. The average price actually paid was from 62 cents per acre to $2.05 per acre. (R., 1418-1420.) These costs were a part of the average included in the summary of total cost of Class No. 1 acreage. Pages 2 and 3, City Ex. No. 86. (R., 3165.)

The transactions analyzed are convincing as to the company's ability to obtain gas acreage in production areas at a very moderate cost. A similar situation was brought to the attention of the federal court when it thus expressed itself:

> "The record discloses no evidence that even in the proved and producing territory, leases which expire cannot be renewed upon identically the same terms, or that new leases may not be obtained upon such terms in territory as it is proved and comes into production. The conditions of rental seem to be standardized and the terms to be considered mutually fair, the return to the lessor adequate. Under such circumstances the best, if not the only, evidence of value in the record is the investment value."
>
> *United Fuel Gas Company, et al. v. Railroad Commission of Kentucky, et al.*, 13 Fed. (2nd), 510, supra.

The book value carried on Ohio Fuel's record, including the unoperated as well as the operated acreage and also deliberate write-ups made after some special ap-

praisement, is set forth on page 1, City Exhibit No. 89, original. For all leaseholds, minus the deliberate write-ups of 1918 and 1919 amounting to $3,748,036.00, the total book value is found to be $4,730,244.00. The value of the operated or used and useful acreage is obviously less than that amount.

* * * * * * * * * * * * * *

The Supreme Court of Ohio, in reviewing the evidence and the ruling of the commission in the present case, said:

> "The next question which arises is as to the fair valuation of the leaseholds owned by the Ohio Fuel Gas Company and used in the conduct of its business. This court has held in a previous valuation case that the method of using cost to determine value of leaseholds did not give due regard to the value of the property used and useful. No valuation can be based upon market price because of the fact that there is no market for a gas property so extensive as that of The Ohio Fuel Gas Company.
>
> In the case of Logan Gas Co. v. Public Utilities Commission, 121 Ohio St., 507, 169 N. E., 575, Classes 2, 3 and 4 leaseholds (non-producing) were excluded from the valuation upon the ground that the property was not used and useful, and that decision was sustained by this court. In the case of Logan Gas Co. v. Public Utilities Commission, 124 Ohio St., 248, 177 N. E., 587, this court in a per curiam opinion sustained the commission in basing its valuation of Class No. 1 leaseholds (producing) under Section 499-9, General Code, upon book value and not upon market value. Because the valuation found in the Logan Gas Company case was $25.00 per acre, both the majority and the minority of the commission in this case fixed a valuation upon Class No. 1 leaseholds (producing) of $25.00 per acre, it

being conceded in each finding that this valuation is approximately $2,500,000 more than the present book value of all leaseholds of The Ohio Fuel Gas Company and the Logan Gas Company combined, eliminating, as stated in the minority opinion, the 'arbitrary write up' of approximately $3,700,000 in the Logan Gas Company's leaseholds made during 1919. In valuing these leases at more than the book value under this record, the commission was in error. The commission was also in error in including in its valuation the book value of all leaseholds. Only the present book value of Class No. 1 leaseholds (producing) may be allowed."

Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 127 O. S., 109, 187 N. E., 7, P. U. R., 1933D, 238. (R., 62.)

The language of Mr. Justice Stone in the United case, supra, is here applicable.

"On the record as made, appellants have failed to present any convincing evidence of value of their gas field which would enable us to assign to it any greater value than that which they appear to have assigned to it on their books. This book value, therefore, may be accepted not as evidence of the real value of the gas field, but as an assumed value named by the appellants, which, on the evidence presented cannot reasonably be fixed at any higher figure."

United Fuel Gas Company, et al. v. Railroad Commission, 278 U. S., 300, at page 318.

Finally the Ohio court concluded with the following statement:

"It was held in United Fuel Gas Co. v. Kentucky R. Commission (1925), 13 F. (2d), 510, that for rate base purposes, gas acreage belonging to a natural

gas company should be valued at its book value rather than on the basis of its earning capacity. The court adverts to the fallacy of the argument that because of the earning capacity and large return allowed the property has greatly increased in value, and that such increased value should thereupon be taken as the basis of another calculation of a still larger return. The holding of that case was affirmed by the United States Supreme Court in the case of United Fuel Gas Co. v. Kentucky R. Commission, 278 U. S., 300, 73 L. Ed., 390, P. U. R., 1929A, 433, 49 S. Ct., 150.

This same fallacy has been pointed out by Mr. Justice Hughes in the Minnesota Rate Cases (1913), 230 U. S., 352, 57 L. Ed., 1511, 33 S. Ct., 729, 48 L. R. A. (N. S.), 1151, Ann. Cas., 1916A, 18, and by Mr. Justice Brandeis in his concurring opinion in Missouri, ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, 262 U. S., 276, 67 L. Ed., 981, P. U. R., 1923C, 193, 43 S. Ct., 544, 31 A. L. R., 807.

The court in United Fuel Gas Co. v. Kentucky R. Commission, supra, felt itself constrained in the absence of market value and under the rule just stated that earning capacity should not be taken into consideration for establishment of the rate basis, to hold that the best, if not the only evidence of value in the record, was the book value.

In view of this holding of the United States District Court, and the specific holding of this court, in Logan Gas Co. v. Public Utilities Commission, 124 Ohio St., 248, 177 N. E., 587, we hold that the value of Class No. 1 leases should be reduced to book value, and reduced to the book value of Class No. 1 leases alone."

Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 127 O. S., 109, 187 N. E., 7, P. U. R., 1933D, 238, supra. (R., 63.)"

No proof was offered by the appellant company as to the value of the leaseholds of Ohio Fuel which in any way assisted the commission or gave it any right to complain concerning the action of the commission or the court. The city of Columbus in its brief (brief of appellee, the city of Columbus, in the Columbus Gas case, supra, pages 168 to 178, inclusive), under the heading "Gasoline extraction and oil production of the Preston Oil Company in conjunction with Ohio Fuel," points out some very interesting facts relative to such leaseholds and the purported cost of gas production to Ohio Fuel. This discussion will not be repeated here, but the court is requested to consider it in connection with this case. It is quite instructive.

6. Amortization and Depreciation Charge—The Ohio Fuel Gas Company.

Appellant protests the treatment of Ohio Fuel in the matter of amortization. (Appellant's Brief, Sub-heading 10, at page 109.)

The city of Columbus in its brief (brief of appellee, the city of Columbus, in the Columbus Gas case, supra, pages 189 to 204, inclusive), discusses this subject in the following manner:

Amortization.

"No claim was made for amortization by the Columbus company for its own properties. Its only contention in this matter is presented for Ohio Fuel and United.

This annual amortization allowance must not be confused with the annual depreciation allowance which was included by the commission and approved by the court; it is demanded as a separate and distinct allowance.

Amortization as requested in this case may be defined as the payment over a period of years by consumers to a corporation of an amount equal to the present purported reproduction and/or market value of all its properties, both tangible and intangible, in addition to the payment of all operating expenses, including repairs and replacements of property, the building up of a depreciation reserve and the rendering of an annual return.

Demands of this nature from public utility companies must be closely scrutinized; they are often made for the express purpose of rendering commission regulation impotent. Through these preposterous additions to operating expense some companies seek to obtain unjust and unfair rates while calmly maintaining that governmental agencies can do nothing but place upon them the stamp of approval.

There is little place for amortization in utility regulation because it has been found to readily lend itself to all kinds of abuses. It should never be allowed except where property can be given a definite life beyond which it will serve no useful purpose. Confiscation can be claimed only if the end of the business and the destruction of the company's investment are predictable by reliable testimony. Where this cannot be done a gas business has no more right to lay claim to amortization

allowance as a matter of constitutional guarantee than the telephone business or the electric light business. Unless the termination of a business can be predicted with reasonable certainty there is no constitutional support for an assault upon a statute denying the right to amortization in that business. The vice of permitting amortization of property that has indefinite life and usefulness and of basing an annual charge upon fancied and inflated values is fully apparent in this case.

The Claims for Ohio Fuel.

In order to acquaint the court with the extent of the demands of the company we must refer to a few of the items included to which amortization would apply:

Engineering and superintendence	$3,049,442.00
Law Expenditures, Insurance, Taxes	1,199,953.00
Organization	1,999,922.00
Interest	4,619,426.00
Cost of financing	3,199,876.00
Going concern value	12,000,000.00
Leaseholds	43,004,477.00
	$69,073,096.00

We point out these items specifically because standing alone they plainly demonstrate the indefensible character of the claims on this subject. But in addition the right is demanded to amortize all other properties at the company's claimed cost of reproduction amounting

to more than $70,000,000.00, which, of course, brings the purported total subject to amortization to the amount of $140,000,000.00. (R., 2912-2914.)

A general amortization was thus sought for all these inflated values over a period of 25 years. The amount per year which would be collected for the purpose was $5,449,221.00 and at the same time claim was made for an annual depreciation allowance of $1,420,241.00 or a total annual collection for amortization and depreciation of $6,869,462.00. (R., 161.) Now, upon what evidence does this contention rest? Upon the following from the cross examination of company witness Seyffert:

> "Q. * * * You say the present estimate of the probable life of the natural gas business based on extensive surveys, geological studies, well-pressure decline and analysis, etc., indicates a probable period of 25 years? A. Yes, sir. * * *" (R., 1480.)
>
> "Commissioner Bricker: What else would you set up amortization on except leaseholds?
>
> The Witness: Set up amortization on the whole property, because when the gas is gone, the rest of the property will be of no value to the stockholders." Company Brief, pp. 44 and 45. (R., 1489.)

It may pertinently be remarked that this is a very flimsy pretext upon which to ask consumers to pay an annual amortization of $5,449,221.00. Nevertheless this constitutes the evidence upon which opposing counsel rely. There is nothing else. In fact, the testimony must be read in light of the cross examination of Seyffert in order to understand just how baseless it really is. His testimony, as is shown by the following excerpt from

the record, is of no probative value and was rightly disregarded:

"Q. Now you are going to write this whole investment off in 25 years? (No reply.)

Q. That is your purpose? A. 20 or 25 years; I do not know that we can make it absolutely definite.

Q. Why not 25 or 30? A. Well, in my judgment, that is too long.

Q. Well, you did select 25 and I ask, that is your best judgment? A. Well, I cannot say I just selected 25; I selected about that and used four per cent.

Q. Well, 25 into 100, of course, does give four per cent. You say the present estimate of the probable life of the natural gas business based on extensive surveys, geological studies, well-pressure decline and analysis, etc., indicates a probable period of 25 years? A. Yes, sir.

Q. How do you make up your mind about that? Refer us to the literature which has aided you in reaching that conclusion? A. I am not referring to literature; I am referring to my experience in the business, together with the contact and experience of other people and the generally known hazards of the business and the character of the business, all of which is taken into consideration in arriving at what is a reasonable term over which we feel that we must get a return of the capital or of the value in order not to suffer a loss.

Q. I think you told me rather fairly one day that in no sense did you consider yourself an engineer; you consider yourself an accountant and auditor? A. No, I consider myself more than an accountant and auditor. I have been with the company in this business a good many years.

Q. Oh, I know you have. A. And I know something of the character of the business.

Q. Well, have you made a study of the life of natural gas? A. Well, in my connection with the company, the question of the life of wells and the ques-

tion of the continuance of the business comes up frequently.

Q. But, Mr. Seyffert, a few years ago, five or six years ago, your company was saying that five or six years was the probable life; what has brought about the change?

Mr. Turner: Which company?

Mr. Butler: The Columbus Gas & Fuel Company.

The Witness: Well, I do not know anything about such a statement, to begin with.

Q. You think it was wrong, if it was made by anybody? A. Well, I cannot say because I do not know that it was made.

Q. Well, I will relieve you of that obligation; I will put it differently. Could that have been properly said in 1925, that the probable life of the gas business was five or six years, natural gas business? A. Well, I don't think it could, no.

Q. We don't think so either, but I am interested in knowing how you get at 25 years? A. Well, you know and I know that no one knows exactly when it will be; we have got to make an estimate of that, and as I say here the probable theory is 25 years; it depends upon many things; it depends upon whether you will find additional fields; it depends on how much is taken out each year; and all those things have to be weighed and some estimate has to be made of the probable life which we have done, and we have estimated that as 25 years, which is as long as I think we should for those purposes.

Q. Have you a discussion of that somewhere where you have gone into it, where you have from an accountant's or an engineering point of view reached that conclusion? A. No, sir.

Q. Well, you think that is the best answer you can give me? A. I do, yes, sir.

Q. All right. What does the company's balance sheet reveal as to the amount of the reserve for depreciation and amortization? A. I haven't those figures with me, Mr. Butler; I may have them.

Q. As of December 31, 1929? A. I may have it here. In Exhibit 43, page 5, the depreciation is $19,006,536.66; the amortization $1,739,029.89.

Q. Then you have a surplus of how much? A. We had a surplus December 31, 1929, of $5,288,031.10.

Q. Not that reserve—and I have it in my notes as $20,726,000.00— A. I think you have added the two together; I think that is about right.

Q. Oh, I see. Now that has gone into your property, hasn't it, that 20 million dollars plus; what have you done with that reserve? A. Yes, that has been reinvested in the property.

Q. Well, now, do you mean to say that you expect the commission to allow you to amortize that $20,000,000.00 at the end of 25 years? A. I expect the commission to allow us to amortize any amount of money that is put into the capital of our business.

Q. Well, in the next 25 years at the rate you calculated of about $1,420,000.00 a year, you would raise that to $35,000,000.00 or $40,000,000.00 more; would you expect that to be returned? A. Whatever money is put into plant absolutely we expect to be returned to us.

Q. You want this commission now to allow you to bring back the whole of this $140,000,000.00 at the end of 25 years although you already have a reserve in excess of $20,000,000.00 and although under your set-up you will in the next 25 years get an additional reserve of $35,000,000.00 or $40,000,000.00? A. That is rather a long question but I think I can answer it—

Q. All right. A. By saying that the value of the property as found here is $140,000,000.00; we certainly are entitled to have that returned to us during the life of the property; by application of four per cent. we will get it back in probably 25 years or thereabouts. Now if at the end of that time we get the $140,000,000.00 back, and reinvest it in property, we will certainly expect it back, because that money

belongs to the stockholders and it is reinvested in different property and during the life of that property we certainly would expect it back again; or any other money that is put into the plant; always we must get it back or we stand to suffer that loss."

* * * * * * * * * * * * *

"Q. What are you going to do with this $35,000,000.00 or $40,000,000.00 that you propose in the next 25 years to take for the purpose of depreciation—what you call depreciation and amortization as distinguished from your big amortization; what are you going to do with that; and whose money is that? A. It is the stockholders' money.

Q. The stockholders' money? A. Yes, that belongs to the stockholders. When the company earns some money at agreed rates or rates adjusted by the commission and creates an amount above operating expenses, that belongs to the stockholders. The reserve is set-up for the benefit of the stockholders so that he will get his money returned to him.

Q. But you are going to return it to him under your general amortization plan? A. I don't get your question.

Q. All right. By the way, how long has this company been in operation? Give me the historical set-up of this company in as few words as you can. A. Well, of course, it has been growing all the time; it has been growing all the time; it starts out in a small way and the earnings and the depreciation reserves have been reinvested in the plant until it has grown from—I think The Ohio Fuel Supply Company started in 1902; some of the other units may have been a little older. I think The Columbus Gas & Fuel Company was a little older than that; probably not as a natural gas company; but from that beginning they have grown up to what they are today." (R., 1480, 1481, 1482, 1483, 1484.)

Ohio Fuel and its predecessors have been in existence for approximately 30 years during which time they have continually bemoaned the impending exhaustion of the supply of natural gas while meters clicked steadily. But it remained for the Columbus company to come into this rate case at a time, when natural gas is admittedly known to be the most plentiful in its entire history, and ask the commission to consider amortization for Ohio Fuel of all properties at a claimed present value of $140,000,000.00 over the period of the next 25 years in order that it (the Columbus company) may charge to its operating expenses a high rate for purchased gas.

One wonders why during all those 30 years, when the "wolf" was supposed to be coming at any minute, some of this amortization which s now fancied necessary did not take place. The fact that these companies have already had a long life, during which time they have collected high rates and paid large dividends while amassing big reserve funds, appears of no importance to the company.

Again we quote from the cross examination of Seyffert:

> "Q. Well, now, by what process of reasoning do you take those combinations of properties and fix them at $140,000,000.00 and then amortize off the whole of it in the next 25 years? A. I have told you before that I did not fix the $140,000,000.00. However, that was fixed through a valuation which is expressed here. Now if we are to go forward with this plant and if we are right in our estimate of the life of 25 years, then we must amortize it at that rate in order to get the value of the plant back in that period of time.

Q. Well, shouldn't you have been amortizing back there; shouldn't somebody have been amortizing? A. Not necessarily, no, sir." (R., 1484, 1485.)

Such is the indefensible basis upon which the Columbus Company seeks to support an unfair charge by a sister corporation.

Indeed, the Harvard professor, brought to the witness stand as an outstanding expert by the Columbus Company, said that amortization is a matter of negligible importance and should not be considered in connection with the settlement of our rate. Here is his testimony:

"Q. What per cent would you think it safe to put aside for the time the gas would be depleted to pay you back your capital? A. I should refuse Your Honor to even guess at that, the wildest sort of guess. I should assume in the buying of a natural gas property today in our eastern field, I should assume that that was a possibility which did not have to be taken into account. The advanced technique, the possibility of the use of producer gas in connection with natural gas, and the ultimate substitution of producer gas for natural gas, if necessary, in the eastern territory—all these were factors which made such an assumption unnecessary.

Q. So if you would assume that somebody in this case had testified that it would be the part of good business to put aside a reserve of four per cent each year to get the capital back at the end of 25 years, you would not agree that that was necessary? A. No, sir, I would not agree." (R., 2599.)

Of course opposing counsel ignores this evidence and attacks the opinion of the Supreme Court of Ohio. But they cannot conceal the weakness of their contentions by such a ruse.

Under no theory is there any right to a general amortization of the properties of any of these companies. The Record in this case shows conclusively that there is no shortage of natural gas. That is a bogy with which consumers were once frightened into paying higher rates, but no longer. The city took great pains to destroy the old cry, "The wolf is coming". The exhibits and testimony clearly justify the view that the court should waste no time in considering the lack of supply or any cessation of the supply. Dewing, as we have shown under rate of return, said that great trunk lines are being tied up with each other in both eastern and western fields so that instead of drawing from particular fields we are now drawing from greater reservoirs of natural gas and that exhaustion of supply for any particular locality is growing less and less each year. He said that in a city like Columbus failure of supply is a factor that need not be noticed. (R., 2598, 2599.) Another witness for the company, Wheeler, said that a few years ago consumers were being urged to use less gas but are now being induced to use more gas because the reserves are known to be much larger than was then thought. (R., 2664.)

We have shown the vast extensions of pipe lines and the vast aggregations of capital that have gone into them. Great pipe lines have gone into the east, to Baltimore, Washington and Philadelphia, from West Virginia and Kentucky. Great pipe lines have been laid across the prairies to Chicago, and the Columbia System has put millions into a pipe line that taps the great reservoirs in the southwest. (R., 1478, 3104B, 3089, 3090.)

The evidence discloses nothing to prove that the experience of the Columbia System even suggested remote fears of failure of supply. This testimony is submitted:

> "Chairman Geiger: All right. Well, now, if the Columbia Gas & Electric Corporation, which is the parent company of these subsidiary companies, had any fear that there was to be a near failure of the gas supply in the various gas fields, why have they expended large sums of money, which they necessarily must do, to construct these distribution lines into these large cities?
>
> The Witness: I have not heard any one say that the Columbia fears that the supply would exhaust.
>
> Mr. Turner: Mr. Seyffert has correctly answered that there has been no such testimony and no statements made except Mr. Butler's questions.
>
> Chairman Geiger: You then would say that there is no imminence of failure of the gas supply at this time?
>
> The Witness: I know the management of the Columbia well enough to know that they are not spending money unless they can feel that they can get their money back and an earning from it. They are good enough business men to do that, and they certainly have looked into the question of the supply of gas before they would build a line of that type.
>
> Chairman Geiger: All right, then, that answers the question; there is no fear now in the minds of The Columbia Gas and Electric Corporation that there will be a near exhaustion of the present supply of gas?
>
> The Witness: None that I have ever heard expressed.
>
> Chairman Geiger: All right." (R., 1479.)

The record further shows that there are millions of acres of unfouched gas lands in Ohio and West Virginia.

We again invite attention to the testimony of wit-

nesses for the company discussed under Unoperated Leaseholds showing their estimate of gas reserves in Ohio.

There is no reason for assuming in the instant case, without proof, that the usefulness of the property now devoted to natural gas service by Ohio Fuel and United is even limited to the life of the natural gas supply. In fact the testimony of Dr. Dewing reveals what he calls "the possibility of the use of producer gas in connection with natural gas, and the ultimate substitution of producer gas for natural gas, if necessary in the eastern territory." (R., 2599.) This, it may be assumed, is due to the extensive deposits of coal located in eastern territory, including Ohio and West Virginia, from which artificial gas may be produced.

Commissioner Bricker, in the minority opinion, stated the situation as follows:

> "Ten years ago in Ohio a similar investigation as this would have brought promptly to issue the question of the supply of gas, the company contending then as did other companies that the supply was rapidly running out and that there must be consideration given to the amortization of property and unobserved depreciation allowances, based upon a maximum gas supply of ten years. The company's witnesses in this case state that for all practical purposes the supply of natural gas available for this market is unlimited.
>
> The commission therefore can approah this problem without giving consideration to the life of the property other than as to those factors resulting from normal depreciation and obsolescence." (R., 192.)

The majority opinion thus tersely stated their conclusions:

> "However, gas seems now to be such an assured product that for the purposes of the present consideration it may be regarded almost as reliable as a water supply." (R., 170.)

The commission and court were fully justified in assuming an unpredictable life for the usefulness of these properties.

On this subject the Supreme Court of Ohio said:

> "There is no provision for amortization under the laws of Ohio. Where the life of a utility's product is uncertain, can it be intelligently and fairly amortized? We think not.
>
> The contention that there should be an allowance by way of amortization sufficient to return the entire investment of the company to the stockholders during the period of the life of the business is untenable as the business has no fixed life.
>
> As bearing on the question of the certainty of the life of the business, the gas company places much stress on the testimony of practical gas men, to the effect that they could not predict a longer life than twenty-five years for the company. Practical experience teaches us that this is a mere prophecy. The gas business will continue so long as natural gas can be taken from the earth in the fields controlled by the parent corporation, in paying quantities. History along this line reveals the fact that the testimony of experts as to the probable life of natural gas is unreliable, and it is for this reason that amortization is guess-work. * * * That the product natural gas will eventually die is self-evident. When it will die is an assumption. An assumption is no stronger than the facts that support it, and it is just as fair to assume that much of the equipment

now used in the transportation and distribution of natural gas will be utilized for the transportation and distribution of artificial gas in the future."

The Columbus Gas and Fuel Company v. Public Utilities Commission of Ohio, supra. (R., 66, 67.)

While it is true that amortization has never received legislative recognition in Ohio, if what is claimed as amortization constitutes some form of depreciation it may be included in the operating expenses under the Ohio statutes as construed by the decision of the court in this case. The court said:

"Unless amortization can be converted into some sort of depreciation there is no authority in law for such a charge in this state.

It may be insisted that unless a reasonable amount is allowed annually for amortization a fair rate basis cannot be attained. That may be true, but the legislature has prescribed a valuation formula. If this formula is unfair to the utility, unless and until it reaches the point of confiscation, the remedy is with the legislature and not with the courts." (R., 69.)

It is perhaps unnecessary for us to state that the construction placed on the statutes of the state by its highest court is accepted by this court.

Thornton v. Duffy, 254 U. S., 361, 368, 65 L. Ed., 304, 41 Sup. Ct., 137;

Douglas v. Noble, 261 U. S., 165, 168, 67 L. Ed., 590, 43 Sup. Ct., 303;

Fallbrook Irrigation District v. Bradley, 164 U. S., 112, 154, 41 L. Ed., 369, 17 Sup. Ct., 56.

But even if the Ohio statutes sanctioned amortization where the life of the gas business could be established with certainty, the evidence in this case would not sustain it and the allowance claimed could not be adopted.

Since the evidence in the case at bar establishes a life expectancy for the business of Ohio Fuel extending into the indefinite future, there is no basis in fact for any claim for amortization. The demand for amortization of all properties was thus properly refused by the commission and the court."

Furthermore in the consideration of this case it must be remembered that an allowance for amortization was made by appellee in the sum of $4,158,954 and even on the basis of including such an allowance appellant failed to establish the increase in rates sought.

7. Delay Rentals on Unoperated Leaseholds—The Ohio Fuel Gas Company.

Under sub-heading 11 at page 117 of its brief (Appellant's Brief, page 117) appellant complains of no allowance for the annual rentals paid by Ohio Fuel on its unoperated leaseholds.

In its treatment of this subject, the city of Columbus (Brief of Appellee, the City of Columbus, in the Columbus Gas case, supra, pages 147 and 148) says:

Since the unoperated acreage cannot be included legally in the valution, it follows that the expense of carrying it, known as "delay rentals," cannot be charged as an operating expense against existing gas consumers.

The commission and court were, therefore, right in eliminating these charges from consideration.

The commission said:

> "The commission is of the opinion that inasmuch as the Supreme Court has held that the nonproductive acreage may not be considered in fixing the rate base, it must logically follow that the expense of carrying that nonproductive acreage may not be considered as a part of the maintenance of the system which has at its command other acreage which is actually producing gas and is therefore used and useful. The commission is in harmony in disallowing as an expense of the company delayed rentals, but is of the view that when this nonproductive acreage is brought into production that the cost incurred in carrying it through its nonproductive period may then well go into its valuation, and be capitalized." (R., 155, 156.)

Commissioner Bricker thus summed up the subject:

> "If this rule were not followed it would be possible for a company, less scrupulous than this one, to pay delayed rentals beyond requirements in order to increase the expenses and upon that basis fix a high rate to the consumer which would have to be approved by a regulatory body and then after the rate had once been established, release the reserve leaseholds, as the company can do under its contracts and cut down the expenses of the company, thereby establishing a rate which would be unjust, unfair and excessive to the public." (R., 197.)

The findings of the commissioners as to delay rentals on unused and unuseful acreage in Ohio were approved by the Supreme Court. *The Columbus Gas and Fuel Company v. Public Utilities Commission of Ohio*, 127 O. S., 109, 187 N. E., 7. (R., 58.)

8. A Contract to Purchase Gas Made Between Affiliated Gas Companies is Not Conclusive as to the Reasonableness or Fairness of the Contract Price and in Determining a Just Gate Price For Gas a Public Utilities Commission May Require Evidence as to the Cost of the Gas So Produced and Sold.

Under Sub-heading 12, (Appellant's Brief, p. 119), appellant contends that the court below erred in disregarding the contract between the Ohio Company and the United Company under which the Ohio Company purchases from the United Company gas produced in West Virginia and Kentucky and in fixing as a price which the Ohio Company could include in its operating expenses for said gas an amount less than that fixed by the contract, on the theory that this action was an interference with and a burden upon interstate commerce in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States.

Appellant seems to lose sight of the fact that the only authority claimed by the appellee in this case was to make an investigation in order to determine whether affiliated companies were claiming undue profits at the expense of one another and what constituted a fair charge to the towns here involved for the cost of purchased gas.

It will be remembered by the court that the gas sold to the consumers of the towns involved in this case was transported to the city gates by the Ohio Fuel Gas Com-

pany; that the Ohio Fuel Gas Company secures a portion of the gas so transported from the United Fuel Gas Company; that this gas purchased from the United Fuel Gas Company is mixed with the gas of the Ohio Fuel Gas Company and the mixed gas is then transported to the city gates and sold to the distributing company, the appellant. It might be further noted that the United gas is not interstate gas when it reaches the towns in question for the reason that it is mingled with other Ohio Fuel gas at the Ohio river and no attempt was ever made to separate it. The business of the Ohio Fuel Gas Company is local not national in aspect and north of Wheeler's Station at least there can be no question but what United Gas has lost its interstate nature. But even if the United Gas had not lost its interstate nature the right of appellee to inquire as to the reasonableness of contract prices in order to determine a just gate price has been well established by this court in its recent decision in *Western Distributing Company v. Public Service Commission of the State of Kansas, et al.*, 285 U. S., 119, 76 L. ed., 655, wherein this court held, paragraph 1 of the syllabus, that:

> "'A local natural gas distributing company making application to a state public utilities commission for an increase of rates is bound to show that the price paid by it for gas obtained from a pipe line company is fair and reasonable, although the interstate character of the pipe line company precludes state regulation of its rates, where both companies are subsidiaries of the third company.''

A more applicable decision to the facts present in this case would be hard to conceive. In this case the appellant is a local natural gas distributing company. It made application to a state Public Utilities Commission for an increase in rates and that commission (the appellee) required it to show that the price paid by it for gas obtained from a pipe line company was fair and reasonable. The appellant and the pipe line companies are subsidiaries of the Columbia Gas & Electric Corporation.

It has heretofore been indicated that the gas in question when it reaches the city gates is no longer interstate in character but even if it were that would be of no consequence under the decision of this court in the foregoing case.

To sustain its contention appellant cites the recent decision of this court in *State Corporation Commission v. Wichita Gas Company*, 290 U. S., ..., 78 L. Ed., 362. However, if counsel for appellant had read this case carefully it would have observed that the decision in no wise changes the finding in *Western Distributing Company v. Public Service Commission of Kansas*, supra, but is in accord therewith and has no application to the question before the court in this case.

We quote in part paragraph 1 of the syllabus of the Wichita case:

> "* * * And that in ascertaining the reasonableness of the rate charged by a public utility, no charge for service rendered by a holding or affiliated company or charge for material or commodity purchased from a holding or affiliated company shall be given consideration unless a showing is made of the actual cost to the holding or affiliated company furnishing such service and material or commodity."

III.

RATE OF RETURN.

Upon the basis of the valuation and operating expenses as allowed by appellee, the appellant's rate of return was found by appellee to have been slightly in excess of 6½%. (R., 223.)

Appellant contends that the evidence on rate of return shows that it was entitled to not less than 8%. (Appellant's Brief, p. 120.) This evidence apparently consists of the testimony of Witness Hamilton (R., 566), who testified that, in his judgment, an 8% rate of return was necessary. Presumably if Mr. Hamilton had testified that 10% 15% or even 25% was a necessary rate of return appellant would insist that the evidence established the necessity of allowing such amounts.

Appellant next contends that the question before appellee was the reasonableness of appellant's rates at the effective date of the schedules under consideration (July 17, 1929) which appellant says has generally been regarded as the very peak of prosperous times in this country. (Appellant's Brief, p. 121.) Certainly appellant does not contend that a rate fixed as of a date certain—in this case July 17, 1929—is to ignore the operation of that rate in the immediate future. The increased rates in question have been collected from July 17, 1929, down to the present time and it will be recognized that within six months after the institution of said increased rates

this country entered one of the worst depressions in its history a fact of which this court has taken judicial notice. *(Atcheson, Topeka and Sante Fe Railway Co. v. U. S.,* 284 U. S., 248.) At the time of the hearing in this matter before the appellee (1930-1932) it was a well recognized fact that the country was suffering from a very severe depression and that prices in general were at a very low level but, according to appellant's argument, appellee should have ignored the actual experience of appellant under its increased rates and the actual conditions of the country during that time.

As a matter of fact, appellee contends that it is its duty to consider the fair rate of return not only as of a date certain but in the light of current conditions in the immediate future for, as was said by this court in *Smith v. Illinois Bell Telephone Company,* 282 U. S., 133, 75 L. ed., 255, 51 S. Ct., 65:

> "A rate order which is confiscatory when made may cease to be confiscatory, or one which is valid when made may become confiscatory at a later period."

The further fact that each of these companies is a part of the Columbia system is also worthy of consideration in determining the rate of return for, as was held in *Chesapeake & Potomac Telephone Company v. Whitman,* 3 Fed. (2d), 938, 953, the ownership by a holding company which increases the ease of securing new capital reduces the rate of return. A similar statement is

found in *Smith v. Illinois Bell Telephone Company, supra,* wherein this court said:

> "It is evident that in the present case we are not dealing with an ordinary public utility company, but with one that is part of a large system organized for the purpose of maintaining the credit of the constituent companies and securing their efficient and economic management."

To support its contentions for a larger rate of return appellant cites but two decisions of this court, *Bluefield Water Works and Improvement Company v. Public Service Commission,* 262 U. S., 679, and *United Railways v. West,* 280 U. S., 234. Neither of these cases, however, sustains the contention of appellant that it is entitled to an 8% return. In dealing with this topic appellant again appears to be uninformed as to the more recent decisions of this court for it neglects to mention *Wabash Valley Electric Company v. Young,* 287 U. S., 488, 77 L. ed., 447, 53 St. Ct., 234, or *Los Angeles Gas & Electric Corporation v. Railroad Commission of California, et al.,* 289 U. S., 287, 77 L. ed., 1180, 53 S. Ct., 637.

In the Wabash case, supra, this court at paragraph 9 of the syllabus held that:

> "A rate of return of 7 per cent. for a public utility company supplying electricity will not be deemed so inadequate as to amount to a taking of property without due process because after taking care of debts and dividends there may be nothing left for surplus, where it appears that the company has a surplus equal to nearly 28 per cent. of its total stock and funded debt liability, and the fact that it is a subsidiary of a company by which its stock and se-

curities are owned, and which also owns and finances other similar companies, makes it reasonable to conclude that it is in a more favorable financial situation than if it were a disconnected enterprise."

In this connection it seems only fair to say that the appellant occupies a very excellent position financially in the utility field.

In *Los Angeles Gas & Electric Corp. v. Railroad Commission of California, et al.*, 289 U. S., 287, 77 L. ed., 1180, 53 St. Ct., 637, this court held at page 319 as follows:

"The commission calculated that the company would have a return of 7 per cent. on this rate base.

* * *

"Applying these principles, and considering the financial history of the company, its relations and opportunities, and the general situation as to investments, we find it impossible to hold that a return of 7 per cent. is so low as to be confiscatory. Wabash Valley Electric Co. v. Young, supra, (287 U. S., 502, ante, 447, 53 S. Ct., 234)."

In the very recently decided case of *Illinois Bell Telephone Company v. Gilbert, et al.* (City of Chicago, Intervener) before the three-judge Statutory Court for the Northern District of Illinois, Eastern Division, decided April 29, 1933, and reported in 3 Federal Supplement, 595, it was held in paragraph 11 of the syllabus, at page 596, as follows:

"Under record, fair rate of return on average fair value of telephone company's intrastate property, so as to avoid confiscation, in prescribing rates for telephone service in Chicago, held 7½ per cent. for 1923-1927, 7 per cent. for 1928-1930, 6½ per cent. for 1931, and 5½ per cent. for 1932."

At page 605 of the opinion in this case the court said:

> "We have given weight to the facts of which the court takes judicial notice relative to the general decline in corporate earnings during the years 1931 and 1932. It is for this reason that we have fixed 6½ per cent. as the proper rate of return for 1931 and 5½ per cent. as the proper rate of return for 1932. A public utility enjoying the advantages of plaintiff is not entitled to the large earnings made by many undertakings during periods of great prosperity. On the other hand, its return in times of business adversity should not be reduced to the extent that the earnings of many private corporations have been impaired. The range of from 7½ per cent. to 5½ per cent. as found in this case gives weight, in our opinion, to all of the elements which under the ruling of the Supreme Court we are required to consider."

The discussion by appellant (Appellant's Brief, 125-127, inclusive) relating to the hazardous nature of the gas business as a further basis for allowing an 8% rate of return is not worthy of very serious consideration. *The Los Angeles Gas & Electric Company v. Railroad Commission of California, supra,* was a gas case. Furthermore, the record in this case establishes fairly convincingly that there is no present or practical danger of the exhaustion of the supply of natural gas. This theory has long since been exploded though it has been used successfully by many gas utilities for many years. It should be further borne in mind that the appellant is not entirely a gas company. A very considerable portion of its business is concerned with the furnishing of electric light and power (R., 566) so that the argument for increased

return based upon the alleged hazards of the gas business does not seem to be well founded.

It should be apparent that a rate of return of 6½% from 1929 down to the present time will aggregate more than the return allowed by the statutory court *(Illinois Bell Telephone Co. v. Gilbert, et al., supra)* in the foregoing case during the same period.

IV.

ORDER OF REFUND.

If the decision of the appellee which was affirmed by the court below wherein the appellee rejected the application of appellant for an increase in its gas rates in the communities involved, was correct, then, of course, the order of refund was proper for as it has been pointed out heretofore, appellant has been collecting under bond since July 17, 1929, the increased rates found by the appellee and the lower court to be excessive. This collection under bond being in accordance with the provisions of the Pence Law of the then existing Section 614-20 of the Ohio General Code (110 O. L., 366) (Appendix) which law provided for the refund of any increased rates collected thereunder if such increased rates should be found subsequently to be excessive.

Appellant's "Summary Statement" at Page 133.

On page 133 of its brief (Appellant's Brief, p. 133) appellant has set up what it labels as "Summary statement showing result of correction of only a few of the errors complained of." This table is based upon such hypothetical assumptions and conclusions as to defy analysis. In the first place, it assumes that the valuation claimed by it, totalling $1,250,221.00, is correct. It next assumes that it is entitled to an 8 per cent. return on that valuation. From there it proceeds to other assumptions no less violent and on the basis of these assumptions and conclusions decides that it has been deprived of a fair return on its property. It apparently overlooks the fact that the questions before this court for review are as to whether or not the valuation of its property by appellee was correct and, further, whether the operating expenses as allowed by the appellee were less than those to which the appellant was entitled and finally whether as a result its property has been confiscated by the decision of appellee and the court below and then assuming that the answers to all these questions are in its favor it proceeds to construct a table showing the alleged net results thereof.

V.

THE CONTENTION OF APPELLANT THAT THE COURT DID NOT EXERCISE ITS INDEPENDENT JUDGMENT.

Under this heading, appellant sets up two claims. Its first claim is found on page 135 (Appellant's Brief, p. 135), and is as follows:

> "(1) The court below failed and refused to exercise its own independent judgment on questions of fact as well as law. Its judgment therefore results in violation of the Fourteenth Amendment."

That this contention on the part of the appellant is in the nature of an after-thought, is established by the fact that it was not included in appellant's original assignment of errors (R., 4-15, inclusive) but was included in a motion filed for leave to amend its assignment of errors. (R., 16.) The decision of the Supreme Court of Ohio, in both the Columbus case and this case *(The Columbus Gas & Fuel Company v. The Public Utilities Commission of Ohio; The City of Columbus v. P. U. C. O.,* 127 O. S., 109) *(The Dayton Power and Light Company v. The Public Utilities Commission of Ohio,* 127 O. S., 137) shows the careful consideration that was given by the court to the case and the contention of the plaintiff in this connection is so obviously without merit that it does not warrant further consideration.

Its second claim is found on page 136 (Appellant's Brief, p. 136) and is as follows:

> "(2) The evidence in this case being uncontradicted and coming from witnesses whose competency and credibility were not questioned, is conclusive of the facts testified to."

It has previously been pointed out in this brief, time after time, that much of this evidence of appellant's witnesses, particularly relating to the proper gate rate price for gas, was contradicted. It has further been pointed out in this brief, that testimony of witnesses which is purely speculative and conjectural under the decisions of this court, is not controlling. *Wabash Valley Electric Company v. Young*, 287 U. S. 488, 77 L. Ed., 447; P. U. R., 1933, A-433; 53 S. Ct., 234, and *Los Angeles Gas & Electric Company v. Railroad Commission of California*, 289 U. S., 287; 77 L. Ed., 1180; 53 S. Ct., 637.

VI.

THE CONTENTION THAT THE COURT ERRED IN OVERRULING APPLICATION FOR REHEARING.

This contention on the part of the appellant (Appellant's Brief, p. 137), is without merit.

CONCLUSION.

The judgment of the court below should be affirmed.

Respectfully submitted,

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DONALD C. POWER,
Assistant Attorney General of Ohio,
Counsel for Appellee, The Public Utilities Commission of Ohio.

Columbus, Ohio, March 7, 1934.

APPENDIX.

Applicable Statutory Provisions.

Section 499-8. The commission, for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities or railroads of this state, or for any other purpose authorized by law, may investigate and ascertain the value of the property of any public utility or railroad in this state, used or useful for the service and convenience of the public. * * * The commission shall have such power to make all rules and regulations, as to it may seem necessary, to ascertain the value of each and every utility or railroad in the state.

Section 499-9. The commission shall prescribe the details of the inventory of the property of each public utility or railroad in the state; and such inventory shall include all the kinds and classes of property, with the value of each, owned by each public utility or railroad, used and useful for the service and convenience of the public. In ascertaining the value of the various kinds and classes of property of each public utility or railroad, the commission shall have authority to ascertain and report in such detail as it may deem necessary as to each piece of property owned or used by such public utility or railroad to show separately the following facts:

A. The original cost, if any, of each parcel of land owned and used by such public utility or railroad, and a

statement of the conditions of acquisition; whether by direct purchase, by donation, by exercise of the power of eminent domain or otherwise.

B. The value as of a date certain, of each parcel of land owned and used by such public utility or railroad, by comparison with the value of contiguous and neighboring parcels of land, and land of similar character as to location and use.

* * * * * * * * * * * * * * *

D. The cost of new production as of a date certain, of all physical property other than land, owned and used by such public utility or railroad, showing the values of the separate items comprising such property, together with the unit basis of such valuation.

E. Depreciation, if any, from the new reproductive cost as of a date certain, for existing mechanical deterioration, for age, for obsolescence, for lack of utility or for any other cause, the percentage and amount of each class of depreciation, if any, to be specifically set forth in detail.

F. The net value as of a date certain, of all physical property other than land owned by such utility or railroad, to be derived by deducting the sum of the amounts of depreciation from the sum of the new reproductive costs.

G. If there shall be any additional value given to the value of the property of a public utility or railroad due to the possession of a franchise to perform a public service, or for good will or for financing, such additional value shall be separately and specifically set forth, to-

gether with the basis for the computation or estimate of such additional value.

* * * * * * * * * * * * * *

Such investigations and report shall show separately the property used and useful to such utility or railroad in the furnishing of the service to the public, and the property held by such utility or railroad for other purposes, and such other items concerning values and methods of making valuations as the commission may deem proper; which said inventories and reports shall be filed in the office of the commission for the information of the governor and the General Assembly.

Section 499-13. * * * Whenever the authority is conferred or the obligation imposed by law upon the commission to ascertain the value of any public utility or railroad, such valuation under such authority or obligation shall be made in accordance with the provisions of this act.

Section 499-16. The commission shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it which in its judgment have bearing on the value of the property of the public utility or railroad affected. Such findings shall be subject to review by the Supreme Court of this state in the same manner and within the same time as other orders and decisions of the commission.

Section 544. A final order made by the commission shall be reversed, vacated or modified by the Supreme Court on a petition in error, if, upon such consideration of the record such court is of the opinion that such order was unlawful and unreasonable.

Section 546. Upon service or waiver of the summons in error the commission shall forthwith transmit to the clerk of the Supreme Court a transcript of the journal entries, original papers or transcripts thereof and a certified transcript of all evidence adduced upon the hearing before the commission in the proceeding complained of, which shall be filed in said court.

Section 606. For the purpose of maintaining the department of public utilities commission of Ohio, including the payment of salaries, traveling expenses, printing, rent, light, heat, water, telephone and all other overhead expenses, and the exercise of police supervision of railroads and public utilities of the state by it, a sum not exceeding two hundred thousand dollars each year shall be apportioned among and assessed upon the railroads and public utilities within the state, by the commission, in proportion to the intrastate gross earnings or receipts of such railroads and public utilities for the year next preceding that in which the assessments are made. * * *.

Section 614-2. The following words and phrases used in this chapter unless the same is inconsistent with the text, shall be construed as follows:

The term "commission" when used in this act, or in Chapter One, Division Two, Title Three, Part First of the General Code and the acts amendatory or supplementary thereto means "the Public Utilities Commission of Ohio."

The term "commissioner" means one of the members of such commission.

Any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

* * * * * * * * * * * * * * *

When engaged in the business of supplying natural gas for lighting, heating or power purposes to consumers within this state, is a natural gas company;

When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partly within this state, is a pipe line company;

* * * * * * * * * * * * * * *

Section 614-2a. The term "public utility" as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as "railroads" in G. C. 501 and 502, and these terms shall apply in defining "public utilities" and "railroads" wherever used in Chapter One, Division Two, Title Three, Part First of the General Code and the acts amendatory or supplementary thereto or in this act.

Section 614-3. The Public Utilities Commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate "public utilities" and "railroads" as herein defined and provided and to require all public utilities to furnish their products and render all

services exacted by the commission, or by law, and also to promulgate and enforce all orders relating to the protection, welfare and safety of railroad employees and the traveling public.

Section 614-20.

(110 Ohio Laws, 366—Pence Law—Repealed as of June 18, 1929.)

Section 614-20 (Pence Law, 110 Ohio Law, 366). Unless otherwise ordered by the commission, no change shall be made in any rate, joint rate, toll, classification, charge or rental in force at the time this act takes effect, or as shown upon the schedules which shall have been filed by a public utility in compliance with the requirements of this act, or by order of the commission, except after 30 days' notice in writing to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the change, rate, charge, toll, classification, or rental shall go into effect; and all proposed changes shall be plainly indicated upon existing schedules, or by filing new schedules thirty days prior to the time when they are to take effect, but the commission may prescribe a less time when they may take effect, provided, however, that if the proposed change shall effect an increase in the rate, joint rate, toll, classification, charge or rental, notice, in form approved by the commission, published once each week for three consecutive weeks before the effective

date thereof, unless the commission shall authorize a less time, shall be given by publication in a newspaper published at the county seat of each county in which such change applies, and of general circulation therein, or in one newspaper published in, and of general circulation throughout the territory in which such utility operates. Such published notice shall set forth the fact that such application has been made, the effective date of the proposed new schedule, the name and location of the agent of the utility in such county or territory where a copy of such proposed new schedule may be inspected by any interested party; and provided, further, however, that such utility shall at the time of the filing of the schedule with the commission, place on file with such agent of such utility a copy of the proposed new schedule and keep the same on file for the inspection of any interested party pending the hearing before such commission.

Whenever there shall be filed with the commission any schedule affecting an increase in any rate, joint rate, toll, classification, charge or rental, or stating any new regulation or practice affecting any existing rate, joint rate, toll, classification, charge or rental in force at the time this act takes effect, the commission shall have, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other form of pleading by the interested public utility, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, joint rate, toll, classification, charge, rental, regula-

tion or practice; and pending such hearing and the decision thereon, the commission upon filing with such schedule and delivering to the public utility affected thereby, a statement in writing of its reasons for such suspension, shall suspend the operation of such schedule and postpone the use and operation of such rate, joint rate, toll, classification, charge, rental, regulation or practice; but not for a longer period than one hundred and twenty days from the time when such schedule was filed with the commission; and after a full hearing, whether completed before or after the rate, joint rate, toll, classification, charge, rental, regulation or practice goes into effect, the commission may make such order in reference to such rate, joint rate, toll, classification, charge, rental, regulation or practice as would be proper in a proceeding initiated after the rate, joint rate, toll, classification, charge, rental, regulation or practice had become effective; provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, such rate, joint rate, toll, classification, charge, rental, regulation or practice shall go into effect at the end of such period of suspension upon the public utility filing with the commission a bond, undertaking or other security, to the satisfaction of the commission, securing and guaranteeing the repayment, with interest at the rate of six per centum per annum from the date of payment by the consumer to the date of repayment by the utility, to all the consumers of such portion of such increased rate, joint rate, toll, classification, charge or rental, collected by such utility as the commission, upon final hearing, may determine to

have been unreasonable or excessive, which repayments shall be made at such times and in such amounts as the commission shall order, and shall be promptly paid by said utility to the corporations or persons entitled thereto, and in such manner as the commission may prescribe, and if any such money ordered by the commission to be repaid shall not have been claimed by the corporations or persons entitled thereto, within one year from the time the same shall become due and payable in accordance with the order of the commission, all such moneys shall be paid by the utility to the treasurer of the county, or other political subdivision, in which such new schedule is effective for the benefits of its general fund, in such amounts and in such manner as the commission may order; and thereafter such public utility shall not be liable therefor. Such bond, undertaking or security shall be in such amount as the commission may from time to time determine; provided, however, that the amount fixed at any time shall not, in addition to the amount of such increase or other charge made by the utility already accrued, exceed the estimated amount of such increase or other charge made by the utility extending over a period of one year, based upon the business of the utility for the previous year, or be less than one-half of such estimated amount.

All rates, joint rates, tolls, classifications, charges or rentals, of a public utility heretofore or hereafter fixed and determined by any order of the commission under the provisions of this chapter shall be in force and be prima facie lawful for two years from their effective date

or until changed or modified as provided by law, provided, however, that after any such rate, joint rate, toll, classification, charge or rental shall have been in force for a period of two years, the same may be changed by the public utility affected in the manner provided in this section; and that nothing herein contained shall be construed as in any way affecting the right of any person or public utility to make application, as provided in Sections 614-21 and 614-23 of the General Code or otherwise as provided by law, for an order rescinding, altering or amending any order of the commission within said two year period or thereafter.

At any hearing involving a rate increased or sought to be increased after this section shall have become effective, the burden of proof to show that the increased rate or the proposed increased rate is just and reasonable shall be upon the public utility and the commission shall give to the hearing and decision of such question, preference over other questions pending before it, and decide the same as speedily as possible.

Section 614-20.

(113 Ohio Laws, 17—Carpenter Act—Effective June 18, 1929.)

Section 614-20. Filing of application for change of rate; contents.

No rate, joint rate, toll, classification, charge or rental or any change in any rate, joint rate, toll, classification,

charge or rental or any regulation or practice affecting any rate, joint rate, toll, classification, charge or rental of a public utility shall become effective until the commission, by order, shall determine the same to be just and reasonable, except as hereinafter provided, providing however that this section shall not apply to any rate, joint rate, toll, classification, charge or rental or any regulation or practice affecting the same of railroads, street and electric railroads, motor transportation companies and pipe line companies. * * * If said application is for an increase in any rate, joint rate, toll, classification, charge or rental there shall also, unless otherwise ordered by the commission, be filed therewith in duplicate, the following exhibits:

A—A detailed inventory and appraisal of its property used and useful in rendering the service referred to in such application.

B—A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues and incomes from all sources and all of its operating costs and all other expenditures; together with any analysis of so much thereof as it may deem applicable to the matter referred to in said application.

C—A statement of the income and expense anticipated under the application filed. * * * Provided, however, that in all actions or proceedings pending before the commission upon the effective date of this act, in which a rate, joint rate, toll, classification, charge or rental shall be in effect, or shall become effective, and

a bond, undertaking or other security shall have been filed, or may be filed by the utility, it shall be the duty of the commission to proceed to determine whether any portion of such rate, joint rate, toll, classification, charge or rental is unreasonable and excessive, and the utility shall repay to the consumers such portions of such rate, joint rate, toll, classification, charge, or rental collected as the commission, upon final hearing, shall determine to have been unreasonable and excessive, together with interest thereon at the rate of six per centum per annum from the date of payment by the consumers to the date of repayment by the utility. Such repayments shall be made at such times and in such amounts as the commission shall order * * * All rights to repayments of any portions of any rate, joint rate, toll, classification, charge or rental in effect or which may become effective in any action or proceeding pending upon the effective date of this act, and which the commission shall hereafter determine to have been unreasonable and excessive, are hereby preserved, and nothing in this act shall be deemed to invalidate any bond, undertaking or other security of a public utility filed with the commission in such pending action or proceeding, or the obligation of such public utility to make repayments, as may be ordered by the commission.

Section 5483. * * * In the month of October, annually, the auditor of state shall charge, for collection from each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating,

cooling and water transportation company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking one and thirty-five one-hundredths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case.